

Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship

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In this Article, Professor Lazos examines initiatives and referendums in which a majority is in a position to vote on the content of a minority's democratic civic standing. Case law fails to set forth a single test for judicial review; consequently, doctrinal and theoretical coherence in this area is nonexistent. Professor Lazos proposes a test that takes into account social dynamics and focuses on the impact of these measures. First, she examines outcomes over the last three decades of approximately eighty such initiatives and referendums, from the anti-integration movement of the sixties to today's ideological and cultural versions, such as English-only and laws that exclude gay men and lesbians from discrimination protections.

At an aggregate level, minorities "lose" roughly four out of five times. However, on closer examination, the story is more complex. Although anti-minority results easily can be triggered by "we-they" group thinking and reflect more subtle expressions of prejudice, they also are vehicles for ideological conflicts. Because the dynamics are complex, but yet can threaten the polity's civic cohesion, Professor Lazos's proposed test would focus on impacts, not on motives. Under her proposal, courts would focus on how such initiatives impact on a minority's ability to participate and continue to vie in the rough back and forth of democratic politics. Courts would weigh three factors: (1) how such initiatives and referendums impact on a minority's opportunity to participate politically in the polity, (2) whether such laws stigmatize a minority, and (3) whether they unduly burden a minority's participation in civic society. If a court determines that an initiative or referendum severely and detrimentally impacts a minority's participation in the polity, the court then would apply strict scrutiny analysis, and the law would stand only if the state were able to show a compelling state interest that supports the measure.

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America will continue to be divided If we want our laws and other legal institutions to provide the ground rules within which these issues will be contested then these ground rules must not be the conqueror's law that the dominant class imposes on the weaker The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. When the divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere.

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I. INTRODUCTION

A distinct new trend in democracy has emerged in the last decade. Direct democracy measures, specifically initiatives and referendums,² are increasingly being used to address problematic and complex issues that affect the citizenship rights and status of minorities. Thus, such powerful states as California, Colorado, Oregon, Washington, Arizona, and Florida have recently become

¹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 204-05 (1977).

² In the "initiative," voters directly shape legislation or constitutional provisions. Once a minimum number of petition signatures have been procured, the proposed statutory or constitutional language is placed directly before the electorate. By contrast, a "referendum" is placed before the electorate only after the legislature has voted in favor of the proposed constitutional amendment, statute, tax, or proposed petition for statehood. The popular vote then either approves or disapproves the proposed action. See generally JOHN M. ALLSWORTH, *CALIFORNIA INITIATIVES AND REFERENDUMS, 1912-1990*, at 1-15 (1991); *REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 3-21 (David Butler & Austin Ranney eds. 1978); Eugene C. Lee, *The American Experience, 1778-1978*, in *THE REFERENDUM DEBATE* 46 (Austin Ranney ed., 1981).

battlegrounds for direct voter consideration of controversial issues including proposed imposition of "English-only" requirements in the public workplace,³ placement of sharp limitations on the use of affirmative action,⁴ restriction of anti-discrimination protections afforded to gay men and lesbians,⁵ elimination of benefits to illegal immigrants,⁶ and imposition of limits on bilingual education.⁷

These exercises in direct democracy have been subjected to constitutional challenge on equal protection and other grounds and have sometimes been defeated. The best known such case is *Romer v. Evans*,⁸ in which the Supreme Court in 1996 used an equal protection analysis to strike down Colorado's anti-gay rights initiative, Amendment 2. Several other federal and state courts have also recently used a variety of federal constitutional arguments to strike down anti-minority measures that had been adopted using initiatives or referendums.⁹

However, attacks brought to bear against such exercises of direct democracy have often failed as well. Even after the Supreme Court, in *Romer*, had struck down Colorado's anti-gay rights initiative, the Sixth Circuit, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹⁰ refused to strike a quite similar measure. Also, although a federal district court enjoined California's controversial anti-affirmative action Civil Rights Initiative ("CCRI," also known as Proposition 209) on the ground that it violated the federal Equal Protection Clause,¹¹ the Ninth Circuit reversed, holding that under rational basis

³ See *infra* Part III.B.2.c.

⁴ See *infra* Part III.B.2.e.

⁵ See *infra* Part III.B.2.a.

⁶ See *infra* Part III.B.2.d.

⁷ See *infra* Part III.B.2.c.

⁸ 517 U.S. 620 (1996); see *infra* Part IV.C.6.

⁹ See, e.g., *Ruiz v. Hull*, 957 P.2d 984, 1002-03 (Ariz. 1998) (en banc) (holding that the English-only constitutional amendment by initiative violated the First Amendment by requiring that all state and local government officials and employees "act" only in English during performance of government business, and also holding that basic rights of non-English speaking persons to participate in and have access to government were substantially impaired by this amendment); *League of United Latin Am. Citizens v. Wilson*, Nos. 94-7569 MRP, 94-7570 MRP, 94-7571 MRP, 94-7652, 95-0187 MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998), *appeal docketed*, No. 98-55671 (9th Cir. Apr. 21, 1998) (striking California's Proposition 187, which sought to deny both legal and illegal immigrants access to various public welfare and health benefits, on the grounds of both federal preemption and inconsistency with the Equal Protection Clause).

¹⁰ 128 F.3d 289, 294-300 (6th Cir. 1997) (distinguishing *Romer* on the basis that the Cincinnati ordinance did not limit access to political process as did Colorado's Amendment 2), *cert. denied*, 119 S. Ct. 365 (1998).

¹¹ *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1499-1510 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

review the measure did “not violate the Equal Protection Clause in any conventional sense”¹² and also did not restrict minorities’ political access.¹³

When the results of ballot initiatives affecting minority¹⁴ rights are challenged in court, the judiciary is placed in the midst of a highly charged political contest. To resolve such disputes, courts must answer the question of how the Constitution mediates relations between majorities and minorities. In one sense, the judiciary is merely being called upon to perform its ordinary constitutional task as a key democratic actor, reviewing majority actions that might threaten the rights and political and social standing of a minority. However, when courts review actions taken directly by the public, rather than by their elected representatives, the judiciary’s counter-majoritarian hubris is more readily apparent. In these cases, a lone judge is placed in a position of having to tell possibly millions of voters that the voters’ will is inconsistent with that single judge’s understanding of fundamental constitutional values. This version of “I am right and the rest of the world is wrong” represents a judicial challenge that requires courage, vision, and understanding of the politics of a pluralist democracy. When judges do take such actions they fall under intense scrutiny,¹⁵ sometimes including threats to their own powers. For example, when United States District Judge Thelton Henderson enjoined California’s anti-affirmative action Proposition 209, the resulting firestorm included a proposal to limit

¹² Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

¹³ *Cf. id.* at 699 (observing that a single district court judge should not use improper legal analysis to “thwart the will of the people”).

¹⁴ For purposes of this Article, I define a “minority” as a social group that has been constructed by society as different, which experiences a subordinate (relative to the majority) social identity as well as social status, which frequently results in diminished economic opportunities. Such groups frequently are the object of majority hostility, whether conscious and blatant, or more subtle, as would be the case of actions motivated by social identity stereotypes. *See infra* Part III.C.1.b. In this sense it is usually true but not essential that a “minority” group will be comprised of less than 50% of the members of the population. I exclude women from the analysis of anti-minority initiatives, *infra* Part III, because women appear to be a special case, as borne out by the empirical data. *See infra* note 93. However, women are a minority group as herein defined, and the formulation of the proposed test could be applied to women as well. *See infra* Part V.B.1.b. I do not deal in this Article with the more difficult question as to whether the poor are a minority.

¹⁵ Compare Derrick A. Bell, Jr., *California’s Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1457, 1463 (1997) (lauding Judge Henderson’s decision enjoining enactment of Proposition 209 as precisely the kind of “real world” analysis that the Supreme Court has failed to undertake in recent equal protection cases and calling his actions courageous), with H.R. REP. NO. 105-478, at 18 (1998) (justifying cutting back judicial power in initiative and referendum cases because “it is fundamentally unfair and does not accord due process to allow one judge to thwart that collective will”).

individual federal judges' jurisdiction to void direct democracy enactments.¹⁶

These controversies involve a great deal more than legal disputes that uniquely challenge the judiciary. They are part of the ongoing fundamental ideological disagreements that take place between majorities and minorities in a pluralist democratic polity. Although it is true that these conflicts are often about ideas and values, such ideological disagreements can also embody status conflicts, racial attitudes, and majority discomfort regarding the changes that inevitably occur within an increasingly diverse polity.¹⁷ Thus, seemingly ideological disputes can also reflect the social conflicts that occur as a democracy becomes increasingly heterogeneous.

Viewed with a pluralist democracy lens, direct democracy disputes are critically important because they have a community dimension that goes to the very foundation of a democratic polity and of majority-minority relations in that polity. When a majority group succeeds in circumscribing the content of a minority's civil rights and their citizenship status within the polity, it sounds a loud and powerful message throughout the polity. At a communicative level, the majority's vote can be interpreted as a message rejecting the minority group from the polity. Thus, direct democracy influences the cohesion of the polity.¹⁸

Given all of these implications, the standards and methods courts used to review direct democracy initiatives are critically important as a matter of both constitutional law and of principles of democratic governance. Nonetheless, and rather shockingly, the Supreme Court has failed to provide a coherent or even internally consistent analysis of how courts ought to go about reviewing direct democracy measures affecting minority interests and rights. The decisions fail even to present themselves as a consistent body of law and fail dismally in the elementary task of providing lower courts with a clear set of rules to follow in reviewing initiatives and referendums.¹⁹ They also fail to address the key questions of judicial review: how and when courts should provide a check on democratic processes, which are by their very nature impassioned; and when do

¹⁶ See H.R. 1252, 105th Cong. (1998).

¹⁷ The prior two works of this project, Sylvia R. Lazos Vargas, *Deconstructing Homo[genous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998) [hereinafter Lazos Vargas, *Homo[genous] Americanus*], and Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150 (1999) [hereinafter Lazos Vargas, *Democracy and Inclusion*], work through the various challenges to equal protection law of an increasing heterogeneous polity. A basic premise of this work is that majority-minority epistemological conflict is an ongoing condition of our democracy, and equal protection doctrine can, and should, develop better approaches to resolving this kind of conflict.

¹⁸ See *infra* Part III.C.3, Part V.A.1.

¹⁹ See *infra* Part IV.

majority political actions unduly circumscribe minority citizenship status and rights within the democratic polity? Moreover, the case law, like many other areas of constitutional jurisprudence, ignores a rich body of political and social science literature. As a result, doctrine in this area, far more than any other discrete area of equal protection, is in shambles. Courts must recognize that this lack of doctrinal and theoretical coherence has a high cost. It delegitimizes courts' decisions, whether they reaffirm the majority's ballot decision or reinstate a minority civil right.

This Article attempts to fill this void without entirely condemning the process of direct democracy. In this sense the proposal comports with pragmatic political realities. Current political culture holds that direct democracy has a legitimate place in the enterprise of democratic government. Particularly in states that have originated and championed the practice of direct democracy, such measures are politically and culturally entrenched.²⁰ Further, while there is reason to be skeptical of the merits of direct democracy,²¹ it overstates the case and oversimplifies the complexities of majority-minority dynamics to condemn as racially motivated all direct democracy voting outcomes that disfavor minorities.²² The dynamics of what motivates people to vote a particular way are complex,²³ and what should and can be called "racially motivated" is subject to deep controversy.²⁴ Thus, this Article takes the position that direct democracy is a legitimate form of democratic government and of deciding difficult issues before the polity.²⁵

Moreover, unlike Justice Hans Linde²⁶ and Professor Julian Eule,²⁷ well

²⁰ Over 57% of United States voters, in general, believe it appropriate for them to have direct input in legislation and constitutional content. *See infra* note 45.

²¹ *See generally* THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989); JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY: POPULISM REVIVED* 89-95 (1986) (setting forth the arguments for and against direct democracy).

²² *See infra* Part III.C.1.

²³ *See infra* Part III.C.1.d.

²⁴ *See infra* Part III.C.1.b.

²⁵ *See infra* Part II.

²⁶ Justice Hans Linde argues that direct democracy violates the constitutional requirement of republican form of government. *See* U.S. CONST. art. I, § 1 (vesting "all legislative powers" in Congress); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Hans A. Linde, *When is Initiative Lawmaking Not "Republican Government?,"* 17 HASTINGS CONST. L.Q. 159 (1989); *see also* Ira C. Rothgerber, Jr., *Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. COLO. L. REV. 709 (1994). This Article does not address the many fine constitutional points that Justice Linde makes because it

known and courageous critics of direct democracy, I do not view direct democracy as a *unique* structural democratic threat that therefore calls for generalized judicial skepticism toward direct democracy efforts. Rather, the controversies of direct democracy should be viewed within a larger framework of the pervasive dynamics that divide majorities and minorities and affect all forums of democratic deliberation. Constitutional law performs an important function in channeling majority-minority conflicts into processes that will permit and encourage greater mutual understanding.²⁸ The judiciary, which can claim neutrality and is the premier expositor of public reason, has a special responsibility in these kinds of conflicts to craft decisions that reaffirm channels of public discourse and encourage greater mutual tolerance and acceptance.²⁹ Initiatives and referendums are another iteration of the pervasive democratic

takes the pragmatic position, which Justice Linde justly criticizes, that direct democracy is embedded in our civic democracy. *See infra* Part II.

²⁷ Professor Eule argues that direct democracy deserves heightened review because of its failure to “filter out” majority-minority hostility, which he argues representative democracy does, in the lawmaking process. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522–30 (1990). Professor Eule’s work has generated, both directly and indirectly, a great deal of academic controversy and commentary. *See generally* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998); Symposium, *From Gold Dust to Silicon Chips: The California Constitution in Transition*, 17 HASTINGS CONST. L.Q. 1 (1989); Symposium, *Governing By Initiative*, 66 U. COLO. L. REV. 1 (1995); Symposium, *Panel One: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373 (1997); Symposium, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227 (1998); Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994); Symposium, *Voices of the People: Essays on Constitutional Democracy in Memory of Professor Julian N. Eule*, 45 UCLA L. REV. 1537 (1998); *see also infra* notes 96–98 and accompanying text. The argument that I make in this Article is distinct from Eule’s. I am not arguing for heightened review based on a structural disadvantage that direct democracy suffers in comparison to representative government. Instead, I argue that what I refer to as majority-minority initiatives, *see infra* Appendices A–H, can violate equal protection norms given how such initiatives function in the real world. The test that I propose conceivably could be applied to legislative products that involve the kind of interests and values that majority-minority initiatives routinely involve. *See infra* Part V.B.

²⁸ I articulate this theory in greater detail in *Democracy and Inclusion*, *supra* note 17, where I draw John Rawls’s view of the role of courts and the function of public reason in a constitutional pluralist democracy and Martha Minow’s “social relations” theory of equal protection interpretation. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 110–20 (1990); JOHN RAWLS, POLITICAL LIBERALISM 237 (paperback ed. 1996); *see also infra* Part V.A.1.

²⁹ *See* RAWLS, *supra* note 28, at 235.

challenge in a pluralist polity—how to reconcile deep differences in political views, philosophy, culture, and ways of knowing based on who we are and where we happen to be socially situated.

Drawing on both the social science and political literature analyzing the nature of the direct democracy process, as well as the theoretical literature examining majority-minority relations in a pluralist democracy, this Article articulates an equal protection test courts should employ in examining whether particular direct democracy initiatives have unconstitutionally interfered with the rights of a minority group. It argues that it is critical for courts to consider not only doctrine and theory, but also to move beyond decontextualized formalism to understand and account for the political and social context of initiatives and referendums.³⁰ The equal protection analysis advocated focuses on protecting minority group members' access to the polity, and expressly rejects an analytical approach that examines the motives of the voters. The alternative approach advocated here—substantive review to ensure that fundamental citizenship rights are preserved for minorities—will more easily allow courts to be consistent and coherent in their review of direct democracy measures. It will be shown, as well, that such an approach is consistent with the results of many of the Supreme Court decisions in this area, although not necessarily with their reasoning.

Part II examines the politics of direct democracy, showing that such measures have increasingly become an important, distinct political forum. Initiatives and referendums are entrenched in the civic culture of many states. With the rise of new politics, direct democracy has evolved from its grass roots beginnings. Money has become all-important in gaining access to the ballot in half of the initiative states, such as California, which have minimal substantive screening requirements. This easy access to the ballot means that interests that are well financed and well organized can heavily influence state and national

³⁰ For recent work that critiques direct democracy applying political science principles and social science literature, see DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 387–89 (2d ed. 1998) (analyzing direct democracy); SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 665–712 (1998) (analyzing direct democracy); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17 (1997) (arguing that in direct democracy interest group politics and the funding of it plays in a way that significantly undermines public deliberation); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361 (1997) [hereinafter Schacter, *Romer and Democracy*] (arguing that *Romer* should be analyzed as a case in which a majority attempts to diminish a disfavored minority's civic standing); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995) [hereinafter Schacter, *Direct Democracy and Intent*] (criticizing state courts' approach to interpreting popular intent of initiatives and referendums based on political behavioral literature showing that voters' "intent" is a weak concept in the context of direct democracy).

politics.

Part III.A examines the empirical data summarized in Appendices A through H. The data recompiles eighty-two initiatives and referendums from 1960 to 1998, in which the initiative or referendum dealt with a political-ideological issue that enabled majorities to vote on the content of minorities' citizenship. At an aggregated level, minorities "lost" over 80% of the time.

Part III.B then takes a closer look at the various majority-minority initiatives. What are the political realities surrounding majority-minority initiatives? How should the law interpret the consistent "anti-minority" results? By examining the available social science and political science analyses of the various majority-minority initiatives, one can draw some conclusions about the dynamics that take place. The blanket accusation that anti-minority initiatives are racially motivated is too simplistic. Majorities' motivations are mixed, and often the core of the dispute is political and ideological. Yet the data consistently show that easy access to the ballot, political competition, the power of media advertising, and the lack of substantive screening *encourage* latent intergroup competitions, anti-minority resentment, and "we-they" thinking. A judicial test that looks for improper racial or other discriminatory animus or intent, and then strikes only those initiatives that have been "proved" to stem from such animus, is essentially an impossible task. However, these majority-minority initiatives may often have a serious detrimental impact on minorities' participation in the polity. By directly blocking minorities' access to the system, by stigmatizing minorities, and by limiting the democratic civic benefits provided to minorities relative to those afforded to the majority, such measures may alienate minorities and fundamentally decrease their civic participation. Such measures may also encourage majorities in their efforts to exclude or limit minority participation.

Part IV analyzes the key U.S. Supreme Court and other cases in which the judiciary has reviewed majority-minority initiatives. The approaches have been disparate, in application of what constitutional provisions are relevant, in describing the appropriate doctrinal test, and in applying a theoretical framework. These diverse approaches reflect a failure to appreciate that these cases deal with a common problem that involves both politics and majority-minority dynamics. The total incoherence and inadequacy of the theoretical and doctrinal frameworks both allow for excessive discretion and also inevitably weaken the judiciary. The results appear so ad hoc that any decision made, whether reinforcing an anti-minority result or "thwarting the will of the people," can be said to be unprincipled. There could be no worse outcome in this highly critical area.

Part V presents a proposed coherent model of judicial review. Part V.A examines various alternative theoretical foundations for equal protection analysis and argues that the "relational approach" is the most helpful for analyzing

majority-minority direct democracy measures. This model takes as its starting point the idea that the Equal Protection Clause is premised on democratic foundational concepts of co-equality and co-participation.³¹ Part V.B puts forth the test courts should apply in reviewing democratic initiatives and referendums. It suggests that courts should not attempt to look for discriminatory intent, but rather should focus on whether the initiative has unduly burdened a minority group's civic participation. Where such a burden has been imposed, courts should employ strict scrutiny. Part V.B demonstrates that the Supreme Court has, in fact but not in words, taken an approach very close to that advocated in this Article. Part V.C then applies the proposed test to five current and highly controversial initiatives and referendums that impact minority citizenship: measures limiting anti-gay discrimination; imposing "English-only" requirements; restricting bilingual education; eliminating benefits to illegal immigrants; and placing sharp limits on the use of affirmative action. The Article concludes that the initiatives and referendums that are most damaging are those that directly restrict a minority group's access to the political system, thereby jeopardizing majority-minority civic relations in the polity.

II. THE POLITICS OF DIRECT DEMOCRACY

It's nice to be able to fix broken things, and there are a lot broken in California. . . . I certainly fixed bilingual education. I fixed it but good.

Robert Unz³²

This Part will trace the history of direct democracy as an independent form of public deliberation and democratic lawmaking,³³ focusing in particular on the increasing reliance on initiatives and referendums to legislate complex social and constitutional issues. Part II.A describes direct democracy as a mechanism with firm roots in the culture and political structures of Western states. Part II.B discusses and maps the upsurge in the use of direct democracy and describes the modern political context in which direct democracy initiatives play out. Part II.C

³¹ See *infra* Part V.A.1. Professors Gunther and Sullivan divide the equal protection "fundamental interest" cases into subcategories, which include access to voting, access to judicial process, right to interstate migration, and fundamental interest in "necessities" such as welfare benefits. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 840-41 (13th ed. 1997). The "relational approach" fits into the "fundamental interest" category and has been developed by Martha Minow, Frank Michelman, and the prior project, *Democracy and Inclusion*. See *supra* note 28.

³² Frank Bruni, *The California Entrepreneur Who Beat Bilingual Teaching*, N.Y. TIMES, June 14, 1998, at A1 (quoting interview with Robert Unz).

³³ See HARLAN HAHN & SHELDON KAMIENIECKI, *REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES* 8-12 (1987) (providing a brief history of the referendum).

describes the mix of “new politics,” in which media and financing are all important. This means that in the 1980s and 1990s, as well as for the foreseeable future, direct democracy efforts have become more dependent on lucrative financing and less dependent on grass roots efforts.

A. Direct Democracy as an American Political Tradition

Direct democracy is an integral part of the government structure of almost half the states and is deeply entrenched in their civic and political traditions. A total of twenty-three states and the District of Columbia afford voters direct democracy access through the initiative process, and all but two of these also permit citizens to force a referendum on any bill passed by the state legislature.³⁴ Most states have provided direct citizen lawmaking since close to the beginning of the century. The first state to adopt direct democracy measures was South Dakota in 1898, and within the next four years, Utah and Oregon followed.³⁵ Today, all but four of the states that rely on direct democracy are Western states.³⁶

Direct democracy is rooted in the Progressive politics of the turn of the century. This movement, an intellectual predecessor of populism, was preoccupied with the concentration of economic power in powerful institutions, such as railroads, banks, lumber, and mining. Adherents of the Progressive

³⁴ The states that provide for initiative are: South Dakota (1898), Utah (1900), Oregon (1902), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Arkansas (1910), Colorado (1910), Arizona (1911), California (1911), Idaho (1911), Nebraska (1912), Nevada (1912), Ohio (1912), Washington (1912), Michigan (1913), North Dakota (1914), Massachusetts (1918), Alaska (1959), Florida (constitutional initiative) (1968), Wyoming (1968), Illinois (constitutional initiative) (1970), District of Columbia (1977), and Mississippi (1992). All of the foregoing states, except for Florida and Illinois, which only allow for constitutional amendment initiatives, also permit referendums. The following states allow only for statutory initiatives: Utah, Maine, Idaho, Washington, Alaska, Wyoming, and the District of Columbia. See 31 THE BOOK OF STATES 209 tbl.5.15 (1996–1997 ed., 1997) [hereinafter BOOK OF STATES]; CRONIN, *supra* note 21, at 47; PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 28 (1998); DAVID D. SCHMIDT, BALLOT INITIATIVES: HISTORY, RESEARCH, AND ANALYSIS OF RECENT INITIATIVE AND REFERENDUM CAMPAIGNS 3 (Initiative News Report Special Report, 1984). The governmental structure of nine more states allows the legislature to place proposals on the ballot for the approval of voters. See BOOK OF STATES, *supra*, at 153 tbl.5.2. This mechanism is an indirect initiative.

³⁵ See DUBOIS & FEENEY, *supra* note 34, at 27–28.

³⁶ See *id.* The exceptions are Maine, Florida, Mississippi, and the District of Columbia. To be consistent with Elazar’s ideas, *infra*, regarding general spheres of political culture, I use his classification scheme as to which states are “Western” states. He considers Ohio, Michigan, Illinois and Arkansas as Near Western states. See generally DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (2d ed. 1972).

movement believed that decisionmaking by the people could improve government and counterbalance what they perceived to be the capture of state legislatures by powerful economic interests.³⁷

Various theories have been offered as to why direct democracy was and continues to be particularly popular in the West. Charles Price suggests that Western states were more likely to adopt such a radical democratic mechanism because they were newly established as states, unlike Midwestern and Southern states also influenced by the Progressives.³⁸ Daniel Elazar, one of the first political scientists to study seriously the political structure of states,³⁹ argues that states have distinct cultures that influence their political structures.⁴⁰ Elazar developed a typology breaking down state political systems into three archetypal political cultures: (1) individualistic, in which democracy is viewed as a marketplace and political actors bargain in their self interest; (2) traditionalistic, in which political actors seek to preserve the status quo and the holders of political power tend to be the long standing elite; and (3) moralistic, in which a monistic view of the polity dominates, and participants see as the goal of

³⁷ See generally ZIMMERMAN, *supra* note 21, at 68–69; BETTY H. ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 12–14 (1987); Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243 (1975). Cronin describes the movement as leftist, involving labor federations, notably miners, as well as women suffragettes. See CRONIN, *supra* note 21, at 50–51. Eugene Lee describes Progressives as seeking to neutralize the power of special interest groups, curtail political machines, provide education on civic issues, and prompt action on difficult social issues. See Lee, *supra* note 2, at 48. They sought “to make every man his own legislature.” *Id.*

³⁸ When the Progressive movement swept the West, these states more readily translated Progressive politics into structural reform. See Price, *supra* note 37, at 248; see also Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998).

³⁹ Elazar is still widely cited. See *infra* note 157.

⁴⁰ See ELAZAR, *supra* note 36, at 5. He explains that states develop an independent civic state culture shaped by its history, physical and economic environment, and the norms and values of the people who settled and subsequently come to live in the state:

If the usage of the term “people” is understood to mean the particular complex of human culture by which human beings individually and collectively invest particular communities with character, then it becomes very likely, if not inevitable, that each state will possess its own particular characteristics simply by virtue of its settled existence over generations. In turn, its bundle of individual characteristics is what transforms each state into a civil society, possessing a political system that is in some measure autonomous.

political activity to achieve a common vision of the good.⁴¹ States, such as California, with heavy emphasis on moralistic and individualistic values are most likely to emphasize direct democracy.⁴²

The Western states, which share this history of Progressivism and strong individualistic and moralistic cultural and political traditions, continue to account for the disproportionate usage of the initiative process.⁴³ Voters in the states that have direct democracy as part of their governmental structure deem such access to be a highly important and integral part of their system of governance.⁴⁴

States that favor direct democracy have an important influence over the development of opinions in the nation as a whole. For example, such states as California, Oregon, Colorado, Arizona, Illinois, Missouri, Florida, and Washington are not only key economic centers, but also have a far-reaching influence in American politics. It is therefore not surprising that direct democracy measures are now favored nationwide, as well as in the West.⁴⁵

⁴¹ See *id.* at 94–102.

⁴² See *id.* at 114–18 (characterizing California as a state with a strong moralistic culture and with secondary individualistic sentiment). This civic and political tradition can be seen in the decentralized structure of government in California, as well as its constitutional and charter provisions that allow and encourage direct democracy. See ALLSWANG, *supra* note 2, at 4–11. San Francisco, in 1898, and California, in 1911, were among the first local and state entities to incorporate the initiative mechanism into the structure of government. This was a response to concerns that the Southern Pacific Railroad and other special interests had too much influence over state government. See DUBOIS & FEENEY, *supra* note 34, at 3.

⁴³ Elazar's more recent effort identifies the West as where "the national democratic ideals of the nineteenth century were given concrete expression. . . [p]rimarily the products of Jacksonian democracy." DANIEL J. ELAZAR, *THE AMERICAN MOSAIC: THE IMPACT OF SPACE, TIME, AND CULTURE ON AMERICAN POLITICS* 140–41 (1994). In 1978, Oregon, California, North Dakota, Colorado, Arizona, Washington, and Oklahoma accounted for three-quarters of initiative measures proposed nationally. See Lee, *supra* note 2, at 48–49. California, along with Oregon, another Western state with strong ties to the Progressive movement, accounted for nearly one-third alone. See *id.* In Professors Dubois and Feeney's tally of the total number of initiatives placed on the ballot nationwide since their inception, it is the Western states that take the lion's share. Since the adoption of the initiative through 1996, Oregon has had 292, California 257, North Dakota 170, Colorado 153, and Arizona 141. See DUBOIS & FEENEY, *supra* note 34, at 30.

⁴⁴ In California, for example, a recent opinion poll found that two-thirds of California voters approve of the initiative process. See CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 19 (1992) [hereinafter CALIFORNIA INITIATIVE FINANCING REPORT]. This recent study reports that "Californians cherish the initiative process. They now turn to the initiative almost instinctively—to address almost any problem—without first seeking a legislative solution." *Id.* at 18.

⁴⁵ A fairly recent national poll reflected that 57% of the American public would favor a national statutory initiative process. See SCHMIDT, *supra* note 21, at 176 (reporting that the

At the same time, direct democracy initiatives have been the subject of substantial criticism by political scientists: complex issues are presented to the voters on a yes or no basis without the benefits of deliberation and without the check of representatives having to be accountable to the interests of others. Julian Eule has persuasively argued that the agency obligations and accountability of representative democracy militates against self interest and careless decisionmaking, while direct democracy fails to “filter” out the passions evident in direct democracy.⁴⁶ Others, like David Magleby, have emphasized that the analytical process surrounding initiatives is distinctly “bounded” in its rationality in ways that representative bodies clearly are not.⁴⁷ In direct democracy, voters do not have the time or motivation to work through the implications of a proposal. Studies show that voters often are confused or fail to understand the full implications of their vote.⁴⁸ Voting falls off as the ballot lengthens, indicating that voters may not even be sufficiently motivated to read through the ballot.⁴⁹ Elites (high income, high education, interested in politics) are more likely to vote on initiatives and referendums than are other citizens, including those alienated from government—the group to which direct democracy is said to be directed.⁵⁰

Even though theorists ably argue against direct democracy, direct democracy appears to be firmly entrenched in the political imagination and in the political culture of key Western states.

Gallup poll showed that citizens backed a national initiative by a 3-to-1 margin, in that 57% approved, 21% opposed, and 22% were undecided). Schmidt also provides a description of the national movement. *See id.* at 174–81.

⁴⁶ *See* Eule, *supra* note 27, at 1526–30 (describing the representation filter, divided power filter, and the entrenched rights safety net).

⁴⁷ *See* MAGLEBY, *supra* note 21, at 128 (explaining that there is a relatively high proportion of voters that drop off as ballots lengthen and positing that drop off occurs because “many voters have not even heard of the ballot propositions before voting”).

⁴⁸ For example, in Magleby’s survey of the California 1972 elections, over one-third of voters had not heard of one proposition that did not enjoy wide publicity. *See id.* On another proposition in the 1976 elections, more than half had not heard of the proposition six weeks prior to voting. *See id.*

⁴⁹ *See id.* at 129 (reporting that 78% of Colorado voters report being either “somewhat informed” or “not too informed” as to issues and that less educated voters report themselves as being either “not too informed” or “not at all informed” on the issues presented in initiative ballots).

⁵⁰ *But see id.* at 160–65 (reporting on a study by Florida State University researchers that found that alienated voters, those discontent with government, were not any less or more likely to vote on initiatives).

B. *The Trend Favoring More Direct Democracy*

Although direct democracy has become a potent force in national politics, primarily in the last decade, its growth has been part of a multi-decade phenomenon. This trend can be demonstrated using data collected both nationwide and in California. According to David Magleby's national tally of initiatives and referendums during the twentieth century, the number of initiatives and referendums proposed during the 1960s totaled less than one hundred and in the 1970s nudged over one hundred.⁵¹ In each of those decades, the number of initiatives approved was less than fifty.⁵² It was in the decade of the 1980s that direct democracy made a spectacular leap, with the number proposed at about two hundred, while the number successful was roughly one-third of that.⁵³ In the 1990s the growth rate of initiatives and referendums has continued to be spectacular in terms of both proposal and approval. Magleby projects over 350 initiatives and referendums for the decade with about 165 being approved by the voters.⁵⁴ California data demonstrate an even more dramatic growth, while following the same basic trend.⁵⁵

The kinds of issues addressed by initiatives reflect the strong populist component of direct democracy. From 1970 to 1985, initiatives addressed taxes and other financial issues,⁵⁶ procedural measures designed to curtail the power of government and public officials,⁵⁷ and environmental and land use issues. Professor Betty Zisk's national study of the initiative process in twelve states from 1976 to 1980 shows a dispersal of statutory initiatives, with taxation and

⁵¹ See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 27-31 (1995) (presenting and analyzing data showing an upsurge in direct democracy during the 1990s).

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ In the two decades from 1950 to 1969, a total of 21 direct initiatives were placed on the California ballot and only 24% of these passed. See ALLSWANG, *supra* note 2, at 12. During the following decade, 1970 to 1979, the total number of initiatives (22) roughly approximated the number of the prior two decades combined. See *id.* By comparison, in 1990 alone, California's number of initiatives totaled eighteen. See *id.* The California data show that the number of initiatives circulated for possible placement on the ballot also increased in the 1980s and 1990s. However, the proportion that made it to the ballot has remained relatively consistent since the 1960s at between 13% and 21%. See DUBOIS & FEENEY, *supra* note 34, at 97.

⁵⁶ Under this category, I include the typical efforts to limit bond financing and initiatives aimed at permitting gambling. The latter are not strictly "grass roots." The experience in Florida has been that corporate interests typically sponsor these.

⁵⁷ Examples are term limits, forcing greater financial disclosures, and reconfiguring districts.

financial issues (14) gaining an edge over environmental (8) and structural governmental measures (8).⁵⁸ California data track these results.⁵⁹

Of all the initiatives that made the ballot during this period, Proposition 13, enacted in California in 1978 to limit the power of local government to increase property taxes,⁶⁰ ably demonstrates the populist politics of initiatives during this period.⁶¹ Professor Scammon comments that Proposition 13 was not really an attack on taxes as such. "It was an attack on . . . a group of men and women referred to collectively as 'those clowns in Sacramento,' who had sat on a \$5-billion surplus in the state of California and, because of their disagreements about how the money should be used, had never done a thing with it."⁶² The voters said, "All right, if you cannot make a decision, we'll make it for you."⁶³

⁵⁸ See ZISK, *supra* note 37, at 17. The twelve states were Alaska, Arizona, Colorado, Maine, Montana, New Jersey, Ohio, South Dakota, Utah, Virginia, and Washington. There is also no discernible pattern as to whether taxation, structural, or regulatory initiatives were more likely to succeed. All registered likelihoods of success between 25% and 33%. See *id.* Professor Magleby's recent study makes a similar finding. See David B. Magleby, *Ballot Initiatives and Intergovernmental Relations in The United States*, PUBLIUS, Jan. 1, 1998, available at 1998 WL 25350912.

⁵⁹ Of the 51 initiatives that gained access to the ballot in California from 1970 to 1986, a total of twelve related to taxation and financial issues, six related to the environment, nine attempted to reform the structure of government, three affected public workers, and fifteen were general regulatory provisions. See MARCH FONG EU, CALIFORNIA SECRETARY OF STATE, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 30 (1992) [hereinafter CALIFORNIA INITIATIVE PROCESS]. Similarly, in Florida from 1972 to 1986, the measures that gained access to the ballot included proposals for authorization of gambling, limitations on taxes, greater disclosure of finances by public officials, and limiting damages on malpractice suits. See Memorandum of the Florida Secretary of State to the Florida Constitutional Revision Commission (1998) (on file with the author).

⁶⁰ The summary of Proposition 13 reads: "Limits ad valorem taxes on real property to one percent of value . . . [based on] 1975-6 assessment rates . . . Limits annual increase in value." Proposition No. 13 (June 6, 1978), reproduced in ALLSWANG, *supra* note 2, at 135-36. In addition, Proposition 13 provided that valuation of property was to be frozen at the 1975 valuations, except when property was subsequently sold, at which point valuation would be set at the sales price. See *id.*

⁶¹ Proposition 13 was the brainchild of two individuals, Howard Jarvis and Paul Gann, who viewed "government [as] the biggest growth industry in this country." Howard Arnold Jarvis & Paul Gann, *Generals of a Rebellion by California Taxpayers*, N.Y. TIMES, June 8, 1978, at A25. Proposition 13 was not supported by big money interests, and no established politician supported this movement.

⁶² THE REFERENDUM DEVICE, *supra* note 2, at 64.

⁶³ *Id.* Professor Sears and Citrin also attribute Proposition 13's success to its incorporating "important elements of a populist crusade against the established political and economic institutions." DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 8 (1982). David Schimdt provides other grass roots initiative success stories to

Proposition 13 provides ample fodder for the criticisms of direct democracy, discussed earlier. California public officials are still dealing with the financing fallout from Proposition 13.⁶⁴ There are social issues as well. The measure has been accused of creating greater gaps between the "haves" and the "have nots,"⁶⁵ a consequence that many voters probably did not contemplate when they approved the tax reform.

C. The Trend in the 80s and 90s: Citizen Lawmaking and the "New" Politics of Money and Media

Beginning in the 1980s, the nature, dynamics, and political potential of direct democracy shifted decidedly away from its grass roots base and toward a new emphasis on money. First, money was increasingly needed to get on the ballot. Second, money was required to sell ideas to the electorate. Inevitably this new emphasis on money would change the type of issues presented through the initiative process, as only heavily supported groups could afford to pursue direct democracy as a means of accomplishing political change.

Every state that provides for an initiative process also requires that to get on the ballot proponents must collect a certain minimum amount of signatures, generally a percentage of the last statewide vote. The required percentage typically ranges anywhere from five to ten percent for statutory initiatives and five to fifteen percent for constitutional initiatives.⁶⁶ In states with very large populations, even relatively low percentage requirements translate into a large absolute number threshold.⁶⁷

underscore his thesis that initiatives are mainly grass roots, populist mechanisms that help ensure greater responsibility and accountability in government. See SCHMIDT, *supra* note 21, at 41-169.

⁶⁴ See John S. Throckmorton, *What is a Property-Related Fee? An Interpretation of California's Proposition 218*, 48 HASTINGS L.J. 1059, 1059-76 (1997) (discussing the ambiguities inherent in Proposition 13 and the volume of litigation it has created).

⁶⁵ See William C. Peper, *Proposition 13 Under an Updated Equal Protection Analysis: Unlucky at Last?* 42 WASH. U. J. URB. & CONTEMP. L. 433, 434-35 (1992) (concluding that under Proposition 13, it is the wealthy who benefit "at the expense of the poor, the frequently uprooted, and first-time homebuyers"); see also Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 813 (1995) (describing the impact of Proposition 13 on public school education).

⁶⁶ See BOOK OF STATES, *supra* note 34, at 211 tbl.5.17. In California, the number required is 5% or 8% of those who voted in the last gubernatorial elections for statutory and constitutional initiatives, respectively. See CAL. CONST. art. II, § 8(b).

⁶⁷ For example, the total required to qualify an initiative for the ballot in California was 700,000 signatures in the 1996 elections. See CALIFORNIA INITIATIVE PROCESS, *supra* note 59,

Signature requirements pose a significant barrier to ballot access, particularly where the requisite signatures must be gathered in a very short time period, such as three to four months.⁶⁸ Dubois and Feeney's recent study observes that signature requirements tilt access to the ballot towards those who have the resources necessary to organize petition efforts to gather large amounts of signatures in a relatively short period.⁶⁹ In California, data from 1986 to 1996 show that only 20% of the initiatives circulated qualified for the ballot.⁷⁰

Whereas in the 1970s and mid-1980s relatively low-cost, grass roots methods were used to secure the necessary signatures,⁷¹ recently signature solicitation has become a more sophisticated and far more costly endeavor, increasingly the domain of professionals who work in conjunction with paid solicitors as well as volunteers. The United States Supreme Court recently ruled

at 10-13.

⁶⁸ See BOOK OF STATES, *supra* note 34, at 211 tbl.5.17. In California, the proponent has 150 days to gather approximately 700,000 signatures. See ANN. CAL. ELEC. CODE §§ 9013, 9040 (West 1996); CALIFORNIA INITIATIVE FINANCING REPORT, *supra* note 44, at 12-13; CRONIN, *supra* note 21, at 62-64; DUBOIS & FEENEY, *supra* note 34, at 96-97.

Although the signature requirement is supposedly intended to filter unworthy proposals, some have argued that it may be more of a financial hurdle than a substantive screen. See, e.g., DUBOIS & FEENEY, *supra* note 34, at 94-112. Studies show that most who sign these petitions do not understand their full import. See CRONIN, *supra* note 21, at 62; MAGLEBY, *supra* note 21, at 61-65. This also correlates with the problem that voters do not necessarily read the entire ballot and are not well informed with respect to the propositions on which they are voting. Rather, voters are likely to use "shortcut" informational methods as signals regarding the content and the desirability of propositions. The social science data indicate that the behavior and appearance of the solicitor, as opposed to the substance of the initiative, are highly influential in the success of the solicitation. See John M. Dardley & Joel Cooper, *The "Clean for Gene" Phenomenon: The Effect of Students' Appearance on Political Campaigning*, 2 J. APPLIED SOC. PSYCHOL. 24, 26-27, 29-33 (1972) (reporting findings of study indicating that the dress of political campaigners affected their acceptance rate); James B. Garrett & Benjamin Wallace, *Effect of Communicator-Communicatee Similarity in Political Affiliation Upon Petition Signing Compliance*, 90 J. PSYCHOL. 95, 97-98 (1975) (reporting findings of study indicating that Republicans would be less likely to sign a petition sponsored by Democrats). An added problem is that the method of payment for paid solicitors is on a per signature basis, providing even more of an incentive to get the signature at all costs. See *id.* at 62-64; see also Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 188-94 (1989-1990).

⁶⁹ See DUBOIS & FEENEY, *supra* note 34, at 96-97.

⁷⁰ See *id.* at 98; CALIFORNIA INITIATIVE PROCESS, *supra* note 59, at 10-13.

⁷¹ Journalist David Schmidt's case studies depict the initiative and referendum effort as mainly fueled by volunteers who developed ingenious grass roots methodologies to garner support, soliciting voters at shopping malls and setting up tables at the exits of grocery stores to obtain signatures. See SCHMIDT, *supra* note 21, at 41-169.

that state regulation of signature solicitors requiring initiative circulators to bear identification badges and register their names and addresses violated the First Amendment.⁷² Printed material and campaign literature must be produced that makes the case clearly, persuasively, and concisely. Direct mail campaigns, instead of face-to-face solicitation, are now used because of their efficiency. Media exposure ensures that voters approached for signatures are receptive to the solicitation.⁷³ In states with only signature requirements to gain access to the ballot, like California, solid financing is a good predictor of success.⁷⁴

Money is also useful at other stages of the initiative process. In those states that impose extensive pre-screening provisions in addition to signature requirements, ranging from ensuring that the wording of the provision not contain any ambiguity to screening for its constitutionality, money can buy expert legal help.⁷⁵ In addition, of course, money is important in securing ultimate voter support. In this era of increasing emphasis on television and other expensive advertising, an ample campaign budget is crucial. In the 1990s, the total tab for a successful initiative, including signature solicitation and campaigning, has been estimated at around \$1 million.⁷⁶

⁷² See *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636 (1999).

⁷³ On the importance of the media, see generally ZISK, *supra* note 37.

⁷⁴ The California Financing Commission reports that only two initiatives failed to qualify where the proponents had spent more than \$500,000. See CALIFORNIA INITIATIVE FINANCING REPORT, *supra* note 44, at 13.

⁷⁵ More than half of the initiative states require some form of substantive prescreening in the form of court review for constitutionality (District of Columbia, Missouri, Montana, Nebraska, Nevada, Oklahoma, and Utah), court review for single subject and clarity of subject matter (Arizona, District of Columbia, Florida, Idaho, Illinois, Nebraska, Oklahoma, and Oregon), and administrative review for such matters as subject matter and ambiguity (Alaska, Arkansas, District of Columbia, Massachusetts, Nebraska, Missouri, Oregon, and Utah). See BOOK OF STATES, *supra* note 34, at 211 tbl.5.17; DUBOIS & FEENEY, *supra* note 34, at 37–45. When substantive prescreening requirements are in place, only a small number of the initiatives circulated actually go before the voter. For example, in Florida, where the Florida Supreme Court automatically must review constitutional initiatives to ensure that the subject matter covers only a “single subject,” see FLA. STAT. ch. 16.061 (1998) (implementing FLA. CONST., art. IV, § 10 by requiring the Attorney General to “petition the [Florida] Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with the . . . State Constitution”), only 8% of the initiatives circulated since the adoption of the initiative have made it to the ballot. See DUBOIS & FEENEY, *supra* note 34, at 32 (reporting that only 15 initiatives have made it to the ballot in Florida through 1996). In 1996, during our era of greater electoral sophistication, 37 petitions were circulated, only four made it to the ballot, and three out of those four were approved by the voters. See Memorandum of the Florida Secretary of State, *supra* note 59.

⁷⁶ See CALIFORNIA INITIATIVE FINANCING REPORT, *supra* note 44, at 12. This seems to be a “rule of thumb” sum for initiatives in large states. California’s Proposition 227, the bilingual

This sum may seem large to most Americans, but it is within the reach of wealthy individuals as well as politically oriented funds and related organizations. In the case of Proposition 227, approximately 60% of the total sum spent on the initiative qualification and campaign was donated by a single individual, Robert Unz, a software entrepreneur.⁷⁷ Mr. Unz used his personal funds to fund an initiative campaign that struck a chord with the electorate, charging that bilingual education was fundamentally flawed in its conception and implementation. Some commentators believe that Mr. Unz, a past unsuccessful challenger to Governor Pete Wilson, has had more of an influence on state politics through Proposition 227 than if he had run for office.⁷⁸

This mix of (relatively) easy access to the ballot, money, and new politics explains why certain states like California, with a highly decentralized political structure, a sophisticated media industry, and a higher than usual population of self-made millionaires interested in politics, have become staging grounds for key controversial issues. Money and its interaction with the way that politics is played out in a modern world has fundamentally changed initiatives from their grass roots beginnings. As early as 1940, V.O. Key, a highly influential political scientist, observed that the premise that the initiative was a democratic expression of "The People" was a romantic notion, stating "[I]nitiative measures do not originate with 'The People.' The moving forces in politics are relatively small groups of men animated by some 'interest.'"⁷⁹ Forty years later, Eugene Lee, another influential political scientist, predicted that initiatives in the 1980s and 1990s would become dominated by "'new politics' . . . with its emphasis on professional campaign management, targeted direct mailings, and the sophisticated sloganeering of the sixty-second television commercial."⁸⁰ In 1992, these forces pushed the California Commission on Campaign Financing to

initiative, is reputed to have cost around \$1.2 million. See Bruni, *supra* note 32. The Florida Civil Rights Initiative was Florida's counterpart to California's anti-affirmative action initiative and was gearing up for a place on the 1998 Florida ballot. Mr. Barry estimated that his group needed to raise \$1 million in six months in order to qualify under the signature requirement in Florida. See Telephone Interview with John Barry, Organizer of the Florida Civil Rights Initiative (Nov. 15, 1997). The Florida Civil Rights Initiative effort was not pursued because Republicans feared that the initiative would cause party losses in the 1998 elections.

⁷⁷ See Bruni, *supra* note 32.

⁷⁸ See *id.* Mr. Unz is reportedly contemplating "fixing," through the initiative process, other areas of state politics that he perceives as flawed. See *id.* His new project is to reform campaign financing. See Todd S. Purdum, *California Republican Tries Altering Campaign Finances*, N.Y. TIMES, Mar. 25, 1999, at A20.

⁷⁹ V.O. KEY, JR. & WINSTON W. CROUCH, *THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA* 572 (1939).

⁸⁰ Eugene C. Lee, *California, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 87, 118 (David Butler & Austin Ranney eds., 1978).

urge that the California initiative process be reformed, observing that "[t]oday . . . petition circulation has become so professionalized and dependent on financial resources that it is difficult to defend it as a true test of popular support."⁸¹

III. "NEW" POLITICS AND BALLOT BOX VOTING ON MINORITIES' CIVIL RIGHTS AND CITIZENSHIP STATUS: IS IT A DEADLY COCKTAIL?

[Direct democracy] reflects all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices, especially when exposed to expensive media campaigns. The security of minority rights and the value of racial equality . . . are endangered by the possibility of popular repeal.

Derrick Bell⁸²

Professor Derrick Bell's indictment of direct democracy has colored the ongoing academic debate as to whether direct democracy is "good" or "bad." In the late 1970s and early 1980s, initiatives and referendums increasingly became a democratic device through which majorities opposed integration and anti-discrimination laws. Bell, writing in 1978, argued that the courts should apply heightened scrutiny to ballot box legislation.⁸³ His argument fits in with his "racism is permanent" thesis.⁸⁴ Bell contends that race shapes American society more than any other factor and that whites endeavor to maintain their racial superiority at the ballot box.⁸⁵ He charges that the new politics of campaigns and the media appeal to prejudice,⁸⁶ and that direct democracy is structurally flawed because it undermines republican government and leaves complex racial questions to an electorate that will oversimplify issues.⁸⁷

In the mid-1980s, analysts responded to charges made by Bell and others.⁸⁸

⁸¹ CALIFORNIA INITIATIVE FINANCING REPORT, *supra* note 44, at 12.

⁸² Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 20-21 (1978-1979).

⁸³ *See id.* at 23.

⁸⁴ *See* DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); DERRICK A. BELL, JR., *RACE AND RACISM AND AMERICAN LAW* (3d ed. 1992).

⁸⁵ *See* Bell, *supra* note 82, at 12-13.

⁸⁶ *See id.* at 18-19.

⁸⁷ *See id.* at 23-24.

⁸⁸ *See, e.g.,* MAGLEBY, *supra* note 21, at 199 (concluding, after a lengthy analysis of direct democracy, that "[t]he practice of direct legislation has by and large fallen short of the reformers' expectations and is prone to abuse"); Bruce Cain, *The Contemporary Context of Ethnic and Racial Politics in California*, in *RACIAL AND ETHNIC POLITICS IN CALIFORNIA* 9

Political scientists Joseph Zimmerman⁸⁹ and Thomas Cronin⁹⁰ minimized the impact of direct democracy on the democratic citizenship rights of minorities. Both asserted that Americans' civic nature was to be fair-minded and implied that Bell's critique was an overstatement of strife in America. Legal analyst Clayton Gillette applied a rational choice model and argued that the threat of direct democracy to minorities was overstated because majorities will encounter collective action problems and transaction costs that will deter group voting.⁹¹ However, he conceded that if "motivations that lure voters to the voting booth simultaneously and systematically induce other-regarding behavior... [majorities] likely will turn out to record their narrowly self-interested preferences."⁹²

The disagreement between Bell and his critics has several bases. At an empirical level, Zimmerman's and Cronin's judgments may be explained, in part, in that their conclusions were based on empirical data only through the mid-1980s, which as detailed in Part III.B, did not reflect a clear picture that minorities consistently lost civil rights battles. It is also a definitional disagreement, because when women are included in the definition of "minorities" the results are much better for minorities than if "minorities" are limited to racial/ethnic minorities, cultural/language minorities, gay men and lesbians, and illegal immigrants.⁹³ It is only these latter groups that this Article

(Byran O. Jackson & Michael B. Preston eds., 1991) (arguing that initiatives lend themselves to racial and ethnic divisions); Priscilla F. Gunn, *Initiatives and Referenda: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981) (same).

⁸⁹ See ZIMMERMAN, *supra* note 21, at 89-98 (listing as one of the myths regarding direct democracy that initiatives target minorities).

⁹⁰ Cronin concludes that "the overall record suggests that American voters have in most cases approved measures protecting or promoting minority rights" and "occasionally used these devices to express nativism, racism, and sexism." CRONIN, *supra* note 21, at 98. He rebuts Bell's indictment of direct democracy as overbroad. First, he separates out initiatives that seek to bar affordable housing, arguing that what might be at stake is not purely racial but also concerns property values. *See id.* at 94. He then focuses on Californian's rejection of two initiatives, both extreme—AIDS as a disease that must be quarantined and banning from public schools any person who "advocated, solicited, encouraged, or promoted public or private homosexual activity" to counterweigh against the stream of initiatives, many at the local municipality level, that successfully proscribed or repealed anti-discrimination laws that would have protected gay men and lesbians. *See id.* at 95-97.

⁹¹ See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 939-74 (1988).

⁹² *Id.* at 954.

⁹³ Women are a "minority" if this term is defined as a politically vulnerable minority group, which is socially constructed in normative terms as inferior relative to men, the group that occupies a position of privilege. *See supra* note 14. However, women's position as a minority is unique given their numerical superiority, diffuseness, and non-isolation. These

defines as “minorities.”⁹⁴ Lastly there is an implicit disagreement as to how pervasive and entrenched racial prejudice is and how much it affects whites’ decisionmaking.⁹⁵

In 1990, Professor Julian Eule augmented Bell’s structural critique of direct democracy. Eule argued that direct democracy deserves heightened review because structurally it fails to “filter out” majority-minority hostility from democratic lawmaking.⁹⁶ In contrast, representative processes structure legislative decisionmaking so that majorities are more accountable to minority interests.⁹⁷ Professor Eule’s thesis, in turn, attracted critiques.⁹⁸

characteristics could explain why their inclusion in the data on majority-minority initiatives yields aggregated results that show minorities doing better. Professor Cronin reports that women fared favorably on equal rights issues during the 1970s and early 1980s. *See* CRONIN, *supra* note 21, at 97. Such a favorable trend was reversed by the national anti-ERA campaign headed by Phyllis Schlafly, which reframed ERA as an anti-family movement. This rhetoric was successful in reversing what at one time had looked like sure victory for the women’s rights constitutional amendment. *See id.* In the area of initiatives and referendums attempting to limit women’s accessibility to abortions, anti-abortion initiatives and referendums have been voted down 14 out of the 20 times that they have appeared on state election ballots. *See* The Feminist Majority Foundation, *The Abortion Issue in the Voting Booth: Analysis of 20 State Referenda, 1970–1992* (Jan. 15, 1998) <<http://www.feminist.org/rrights/rwfact3.html>>.

⁹⁴ *See supra* note 14.

⁹⁵ *See infra* Part III.C.1.b.

⁹⁶ *See* Eule, *supra* note 27, at 1549 (“The judiciary must compensate for process defects. It must serve as the first line of defense for minority interest; a backup is no longer adequate. The absence of structural safeguards demands that the judge take a harder look.”). Eule argues that representatives are more likely to engage in rational deliberation. *See id.* at 1525–30, 1550–56. Deliberation acts as a filter because “[p]ublic debate among those of equal status and eloquence thus ultimately leads to realization of the common good.” *Id.* at 1527; *see also* Julian N. Eule, *Checking California’s Plebiscite*, 17 HASTINGS CONST. L.Q. 151, 152 (1989) (arguing that “the judicial role in this setting ought to be very different from its role in reviewing ordinary legislation”); Julian N. Eule, *Representative Government: The People’s Choice*, 67 CHI.-KENT L. REV. 777 (1991) (responding to Baker’s critique); sources cited *supra* note 27.

⁹⁷ *See* Eule, *supra* note 27, at 1527 (noting that “[i]solated decisions . . . create few opportunities for trade-offs and little need for the establishment of continuing relationships,” while “[r]epresentative government engenders cooperation because winners and losers return to meet again”).

⁹⁸ The critics address Professor Eule’s generalized structural attack of direct democracy. Professor Mark Tushnet makes the case that Eule has failed to establish the need for such skeptical review. *See* Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 ANN. SURV. AM. L. 373 (1997). Professor Charlow rejects the argument that plebiscitary processes deserve greater scrutiny because minority groups are merely like other interest groups that lose out in the give and take of republican politics. She concludes that the focus of inquiry should be in reconstructing equal protection doctrine. *See* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79

As this brief recompilation implies, policy formulations on direct democracy would benefit from being more grounded in political science, behavioral, and sociological data showing how direct democracy actually plays out in the real world. Part III introduces empirical data and behavioral analyses into this debate. Part III.A addresses the basic empirical question: do the past thirty years of data show that minorities consistently lose in direct democracy battles? Part III.B describes in some detail several majority-minority civil rights conflicts to provide an accurate picture of the political events surrounding some of the key initiatives and referendums in which majorities and minorities have been pitted against each other. Among the questions this Part seeks to answer is whether, as Derrick Bell charges, direct democracy reflects majorities' "conservative, even intolerant, attitudes."⁹⁹ Finally, Part III.C sorts out what the political science and social science behavioral literature state are the causes and effects of majority-minority direct democracy conflicts. These analyses will then be incorporated into Part V's discussion of what should be the judicial approach to this important ongoing challenge.

*A. Minority Civil Rights and Citizenship Status Initiatives and
Referendums from 1960–1998: Minorities Lose Most of the Time*

To examine the question of whether direct democracy poses a threat or undermines minorities' civil rights and citizenship status, this Part discusses and analyzes the data presented in Appendices A through H on initiatives and referendums from 1960 to 1998, in which majorities were in a position to vote on the content of minorities' civil rights. The data presented in the Appendices take as a starting point Professor Barbara Gamble's 1997 political science study of initiatives and referendums from 1960 to 1993.¹⁰⁰ For the 1960 to 1993 period, the Appendices describe only those initiatives and referendums whose results could be verified with the citation information provided by Gamble. Additional data for the period 1993 to 1998 are included in the Appendices. Gamble does not claim, nor do I, that this is an exhaustive survey.¹⁰¹ However, my own

CORNELL L. REV. 527 (1994). Professor Lynn Baker applies public choice theory to rebut the argument, made principally by Eule, that representative government is superior in filtering out irrational impulses in lawmaking. See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

⁹⁹ See Bell, *supra* note 82, at 20.

¹⁰⁰ See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

¹⁰¹ See *id.* at 253. There is no database that aggregates all initiatives and referendums. But see LISA OAKLEY & THOMAS H. NEALE, CONGRESSIONAL RESEARCH SERVICE, CITIZEN INITIATIVE PROPOSALS APPEARING ON STATE BALLOTS, 1976–1992 (CRS Report for Congress,

research shows that Gamble's data accurately represent the most significant majority-minority initiatives and referendums of the last three decades. Thus, these data, even if not exhaustive, provide key information on the extent and nature of "anti-minority" initiatives and referendums.

These data show that direct democracy, for the most part, has been an important lawmaking mechanism that has decreased the content of, or staved off advances in, minority rights.¹⁰² As Gamble puts it, the data over this entire period show that although minorities do not always lose in these ballots, they almost always lose.¹⁰³ In the eighty-two initiatives and referendums surveyed in this Article, majorities voted to repeal, limit, or prevent any minority gains in their civil rights over eighty percent of the time.¹⁰⁴ These *aggregated* results seem to validate the criticism of direct democracy leveled by Bell.

B. *The Politics of Initiatives That Target Minority Rights*

Although the aggregated data support Bell's hypothesis that direct democracy will inevitably put minorities at a disadvantage, once these results are examined in detail, the relationship that emerges between majorities and minorities is much more complex.

The data from 1959 to 1998 chart an ongoing and dynamic ebb and flow in minority-oriented initiatives and referendums. The issues in which minorities' civil rights have been contested correspond to two eras of political activism: (1) during the 1960s and 1970s, civil rights activism spawned anti-integration initiatives and referendums, and (2) during the 1980s and 1990s, the growing visibility and acceptance of multiculturalism spawned several waves of cultural/ideological initiatives and referendums. This Part will describe the politics surrounding minority-oriented initiatives in terms of these two major time periods, focusing particularly on several of the most recent sets of initiatives.

1995) (containing useful national recom compilations of state activity). Key states like Oregon, California, and Arizona maintain websites with historical information. Florida's website contains current information only. The key initiatives and referendums have been litigated. *See* discussion *infra* Part III.B.1 and Part IV.C; *infra* Appendices A–H. As Gamble notes, local ordinances in non-major cities and localities are most likely to be omitted. *See* Gamble, *supra* note 100, at 252. For this reason, I believe that any omissions would not alter the conclusions drawn here.

¹⁰² Professor Gamble's survey utilizes a definition of "minorities" that excludes women, which, as she notes, yields different "anti-minority" results than if women were included. *See* Gamble, *supra* note 100, at 252–53.

¹⁰³ *See id.* at 253.

¹⁰⁴ *See infra* Appendices A–H. Gamble's survey covers 74 initiatives and referendums and her results show anti-minority results 78% of the time. *See id.* at 253.

1. *The Anti-Integration Initiatives: 1960–1982*

When the civil rights struggle was at the fore of the national political agenda, the counter-movement resulted in initiatives and referendums challenging anti-discrimination in housing legislation and school desegregation decisions. As shown in Appendices B and C, these anti-integration initiatives were overwhelmingly victorious, resulting in an approval rate of close to 90% whenever they appeared on the ballot.

a. *Anti-Fair Housing Initiatives*

From 1963 to 1968, a total of nine anti-fair housing initiatives and referendums qualified for the ballot.¹⁰⁵ In close to 90% of these cases, the anti-fair housing initiatives or referendums won.¹⁰⁶

In this wave of initiatives and referendums, courts played a key role in resolving the conflict between citizens' rejection of anti-discrimination legislation and representative governments' efforts to expand civil rights initiatives. Two leading cases, which will be discussed in greater detail in Part IV below, invalidated citizens' efforts to repeal or immunize their communities against fair housing laws: (a) *Reitman v. Mulkey*¹⁰⁷ invalidated California's Proposition 14, which had proscribed any state body from limiting a person's ability to lease, rent, or sell real estate; and (b) *Hunter v. Erickson*¹⁰⁸ defeated citizens' repeal of Akron's fair housing ordinance, as well as an automatic referendum-immunizing provision that required majority approval of any fair housing ordinance.

An early study by Professors Wolfinger and Greenstein attempts to puzzle through what motivated California's voters to enact Proposition 14, which was ultimately invalidated in *Reitman*.¹⁰⁹ The proponents of the measure framed Proposition 14 in terms of protecting the "property rights" of owners to sell or lease to any person without governmental interference.¹¹⁰ The researchers rejected the simplistic explanation that proponents of Proposition 14

¹⁰⁵ See *infra* Appendix B.

¹⁰⁶ See *id.* Seven out of the nine surveyed cases involved referendums that attempted to repeal a representative body's decision to enact anti-discrimination housing legislation. See *id.*

¹⁰⁷ 387 U.S. 369 (1967); see discussion *infra* Part IV.

¹⁰⁸ 393 U.S. 385 (1969); see discussion *infra* Part IV.

¹⁰⁹ See Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753 (1968).

¹¹⁰ See *id.* at 764.

demonstrated racial prejudice;¹¹¹ instead, they proposed a more nuanced proposition. Wolfinger and Greenstein observed that residential integration was an issue that deeply divided whites and racial minorities.¹¹² Wolfinger and Greenstein also found data supporting the proposition that most white Californians did not view residential segregation as an issue of racial discrimination.¹¹³ For these reasons, they concluded that while whites were not seeking to harm racial minorities, appeals to white voters that Proposition 14 would damage racial minorities' civil rights did not find widespread support.¹¹⁴

This era of initiative and referendums activism ended when the United States Congress enacted fair housing legislation. The Fair Housing Act¹¹⁵ pre-empted localities' ability to legislate in this area, as well as citizens' ability to repeal and immunize through the initiative and referendum process.¹¹⁶

b. School Desegregation

In the wake of the courts' implementation of *Brown*, seven anti-busing proposals were placed before the voters between 1960 and 1982. Only one failed.

In the early 1960s, federal court-mandated busing already had intruded into established social patterns in the South. Many Southerners resisted and depicted court-mandated busing as a struggle between states' rights and overbearing federal authority. The first two initiatives placed on the Mississippi and Arkansas ballots were radical. Each authorized local authorities to "close down public schools threatened with desegregation."¹¹⁷ The Mississippi initiative passed, while the Arkansas measure was rejected.¹¹⁸

From 1970 through the 1980s, anti-school desegregation initiatives were drafted in less radical fashion. Such measures attempted to use constitutional amendments to limit the remedial power of state courts. One example provided

¹¹¹ See *id.* at 764–65. The researchers rejected out of hand the "property rights" ideological defense, stating that white Southern Jim Crow defenders had used these same philosophical arguments. See *id.*

¹¹² The attitudes of whites "toward residential integration . . . occupy a peculiar position in 'the rank order of discrimination' . . . [serving] almost as a watershed between areas in which resistance to accepting Negroes as equals is high enough to be virtually at the taboo level. . . ." *Id.* at 765.

¹¹³ See *id.* at 766 (citing national poll data).

¹¹⁴ See *id.*

¹¹⁵ Fair Housing Act, Pub. L. No. 90-284, Title VIII, § 801, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

¹¹⁶ See *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285 (6th Cir. 1996).

¹¹⁷ *Many Local Proposals are Decided by Voters*, WASH. POST, Nov. 11, 1960, at A8.

¹¹⁸ See *id.*; see also *infra* Appendix C.

that “no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence”¹¹⁹ on the basis of race. All of the five initiatives so formulated and placed before the voters won.¹²⁰

As will be discussed in Part IV below, court activism played an important role in counteracting the development of anti-busing initiatives, as it had in the housing area. In *Washington v. Seattle School District No. 1*,¹²¹ the Supreme Court ruled that the city of Seattle’s initiative was a de facto racial classification because “there is little doubt that the initiative was effectively drawn for racial purposes.”¹²²

2. Cultural/Ideological Initiatives

Initiatives that attempt to limit a minority group’s push for greater recognition of their civil rights and citizenship status again surged in the 1980s and 1990s under the cultural/ideological banner. By far the most active category were the nearly fifty initiatives and referendums aimed at limiting the civil rights of gay men and lesbians, which were successful 83% of the time.¹²³ Another important cultural/ideological category includes the English-only initiatives and bilingual education. Voters approved every language initiative reported, almost all by overwhelming margins.¹²⁴ Finally, the last wave of initiatives begun in California, Proposition 187, aimed at illegal immigration, and Proposition 209, aimed at affirmative action, complete this category.¹²⁵ This Part will examine in detail the politics surrounding these proposals.

a. Anti-Gay Civil Rights

Close to four-fifths of the reported forty-eight anti-gay civil rights initiatives have sought to repeal or prevent the enactment of anti-discrimination legislation that would include gay men and lesbians as a protected category.¹²⁶ These have

¹¹⁹ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1982) (quoting Initiative 350).

¹²⁰ See *infra* Appendix C.

¹²¹ 458 U.S. 457 (1982); see discussion *infra* Part IV.C.3.

¹²² *Seattle Sch. Dist. No. 1*, 458 U.S. at 471.

¹²³ See *infra* Appendix D.

¹²⁴ See *infra* Appendix E.

¹²⁵ See *infra* Appendices G, H.

¹²⁶ See *infra* Appendix D. These large aggregated numbers may overstate activity because they are influenced by an ongoing battle in one state, Oregon. See Dennis Farney, *Shaky Ground: Gay Rights Confront Determined Resistance from Some Moderates*, WALL ST.

been successful over 85% of the time.¹²⁷ If we focus only on state-wide initiatives, the number drops to eleven, and at this larger jurisdictional level, the success rate drops to about 64%.¹²⁸ Colorado's Amendment 2, overturned in *Romer v. Evans*,¹²⁹ is an example of this kind of initiative, which effectively prevented any attempts by gay men and lesbians to petition local government for anti-discrimination legislation.¹³⁰

Exploring how the anti-gay civil rights initiative movement developed is a good starting point in explaining why ideological/cultural conservatives have found direct democracy electoral politics to be a favorable environment for their causes. Is the electoral environment favorable, as Professor Bell charges, because it allows for an appeal to prejudice and intolerance?

On the one hand, the hypothesis that more radical initiatives, although able to strike a conservative chord within the electorate, are unable to garner citizen support because they are viewed as overreaching also finds support here.¹³¹ In Oregon, after Measure 9, labeling homosexuality as "pedophilia," lost by a decisive 56% to 44% margin, Oregon Citizens Alliance, the initiative sponsor, dropped this more radical language, and recalibrated its campaign around the theme of "no special rights."¹³² Such local initiatives were then proposed mainly in rural and suburban municipalities that had supported the statewide initiative. California's 1978 anti-gay rights Proposition 6 failed because it was more radical than modern anti-"special rights" initiatives. Proposition 6 allowed public schools to fire any employee who might be thought to be engaging in such conduct, and barred any conduct "advocat[ing], solicit[ing], impos[ing] or

J., Oct. 7, 1994, at A1. Close to one-third of the initiatives reported are initiatives in Oregon's rural localities sponsored by Oregon Citizens Alliance (OCA). *See id.* There were a total of 37 anti-discrimination initiatives or referendums. *See id.* Other types reported include banning state actors from "encouraging" homosexuality (4); extending domestic partnership benefits (5) (of which 3 took place in San Francisco); and banning same-sex marriage (2). *See id.*

¹²⁷ The numbers are 32 anti-minority results out of 37, or 86%. *See id.*

¹²⁸ *See infra* Appendix D. In California and Idaho, anti-gay rights initiatives failed in 1978 and 1994, respectively, while succeeding in Colorado. In Maine, voters once approved anti-discrimination protections and then rejected it. Oregon's 1992 Measure 9, labeling homosexuality as "pedophilia," did not fare well, and another 1994 measure was defeated. However, in 1988, Oregon voters enacted a measure that would have authorized school officials to ask employees about their sexual orientation. This measure was subsequently invalidated in *Merrick v. Board of Higher Education*, 841 P.2d 646 (Or. Ct. App. 1992). The latest wave of statewide initiatives that ban same-sex marriage have all been successful.

¹²⁹ 517 U.S. 620 (1996); *see discussion infra* Part IV.C.6.

¹³⁰ *See id.* at 624; *infra* note 504 and accompanying text.

¹³¹ *But see* Oregon Measure 8 (1988), *infra* Appendix D.

¹³² *See* Farney, *supra* note 126.

encourag[ing]”¹³³ homosexual activity. The propositions that purport to merely prevent gay men and lesbians from gaining “special rights” almost always win. Colorado’s Amendment 2 and the ordinance contested in the Sixth Circuit’s *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹³⁴ both approved by overwhelming margins, used this less radical concept.¹³⁵

On the other hand, a close look at the first anti-gay rights initiative, which took place in 1977 in Dade County—home to the City of Miami, a community that today lays claim to being multicultural and tolerant—shows that this category of initiatives can reflect a mix of motivations that include anti-gay sentiment. As with the anti-fair housing referendums, the first anti-gay rights campaign was a direct response to a representative body enacting legislation deemed too progressive and disrespectful toward established norms. Dade County Ordinance 77-4 proscribed discrimination in “housing, public accommodations and employment against persons based on their affectional or sexual preferences.”¹³⁶ Although the ordinance passed, it proved controversial. Specifically, it prompted outrage from the conservative community in Miami, including from Anita Bryant, a fundamentalist Christian and an ex-promoter of Florida orange juice, as well as a one-time supporter of the councilwoman who had engineered the enactment of the ordinance. After unsuccessfully trying to persuade the councilwoman to reverse her position, Bryant spearheaded a campaign for repeal of the ordinance, which gave itself the name “Save Our Children.” In campaign literature, Anita Bryant described what motivated her: “God had tapped me on the shoulder and given me direct marching orders.”¹³⁷ She argued that the ordinance threatened “the moral environment for my children” and undermined parents’ rights to raise children in a moral

¹³³ ALLSWANG, *supra* note 2, at 136–37; *see also* Michael Castleman, *Proposition 6 and the Rights of All of Us*, THE NATION, Oct. 21, 1978, at 403.

¹³⁴ 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998); *see also infra* Part IV.C.6.

¹³⁵ The “specials rights” argument became part of proponents’ arguments as to why Amendment 2 was not unconstitutional in *Evans v. Romer (Romer II)*, 882 P.2d 1335 (Colo. 1995) (en banc).

¹³⁶ Metropolitan Dade County, Fla., Ordinance No. 77-4 (1977), *reprinted in* D. Jason Berggren, *Responding to the Spirit of Stonewall: Righteous Referendums, Ecumenism and the Anti-Gay Rights Politics of the Christian Right* (1995) (unpublished M.A. thesis, Florida State University) (on file with the Florida State University Library). In 1998, the City Commission re-enacted an ordinance proscribing discrimination on the basis of sexual orientation. *See* Metropolitan Dade County, Fla., Ordinance No. 98-170 (1998) [hereinafter *Dade County Ordinance No. 98-170*] (summary and history available at the Equality Florida web site under “Tuesday, Dec. 01, 1998 Minutes” (visited Apr. 20, 1999) <<http://www.metro.co.dade.fl.us/govaction/>>).

¹³⁷ ANITA BRYANT & BOB GREEN, *RAISING GOD’S CHILDREN* 64 (1977).

environment: "I would give my life, if necessary, to protect my children . . . If they are exposed to homosexuality, I might as well feed them garbage."¹³⁸ The heavy religious and moral conservative overtone of Bryant's campaign appealed to moral conservatives among Miami's Jewish population and its predominantly socially conservative Catholic Cuban-Americans. Proponents were almost militant in their conviction that the visibility and civil rights activism of gay men and lesbians threatened the community's moral environment and undermined parental efforts to raise their children properly.¹³⁹ This campaign rhetoric at times was also undeniably homophobic. Bryant and other proponents intimated that one of the dangers of legitimating homosexuality is that this would:

[U]surp their rights and life-long effort to raise spiritually sound God-fearing, heterosexual children and provide homosexuals a green light to recruit and molest their kids in schools, public bathrooms, and elsewhere, and force religious schools, churches and synagogues to hire individuals who partake in activities that they deem "as unnatural and deviant."¹⁴⁰

The victory in Dade County signaled to religious and cultural conservative groups that the American voter was receptive to a morality-driven message and that coalitions could overturn civil rights gains made by an unpopular minority group. In Dade County, Anita Bryant and her supporters had developed a grass roots blueprint for a strategy that could and would be repeated by cultural conservative groups elsewhere. Gay civil rights gains could be effectively combated when cultural conservatives framed such gains in "family values" terms, such as threatening children. Once this theme was established, the campaign could appeal to latent homophobic ideology and cast gay men, in particular, as a per se threat to children. The Dade County campaign showed that groups, to which no political appeal had been made in the past, could be moved into almost militant political activism if the issues were framed as involving general societal decency.¹⁴¹ Anita Bryant was credited with "awakening" apolitical religious conservatives.¹⁴²

Two years following the defeat of the Dade County ordinance, gay men and

¹³⁸ ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 27–29 (1977) (citations omitted).

¹³⁹ See RANDY SHILTS, *THE MAYOR OF CASTRO STREET* 154–58 (1982); Berggren, *supra* note 136, at 70–71.

¹⁴⁰ Berggren, *supra* note 136, at 71.

¹⁴¹ See *id.* at 95–97. Jerry Falwell has argued that the Christian Right had to be galvanized because the political sphere had become too corrupt, posing an attack upon the family, and a religious order. See JERRY FALWELL, *LISTEN, AMERICA!* 130–37 (1980).

¹⁴² See Berggren, *supra* note 136, at 97.

lesbians attempted to reinstate the Dade anti-discrimination rights measure. Gay advocates again lost, by a less severe margin, 58% to 42%. The coalition that Anita Bryant had forged, conservative Jews, Cuban Americans, and political conservatives, held firm in their opposition to gay rights.¹⁴³ It took almost twenty years for the gay community in Miami to overturn the 1978 loss. On December 1, 1998, the Dade County Commission re-enacted the anti-discrimination ordinance, by a narrow seven to six vote, that prohibits discrimination by race, color, religion, ancestry, national origin, gender, pregnancy, age disability, marital or familial status, and *now sexual orientation*.¹⁴⁴

b. AIDS

In contrast with the anti-gay civil rights initiatives, AIDS initiatives have generally not been successful. Only two out of the five initiatives surveyed passed.¹⁴⁵ AIDS initiatives that would "quarantine" or otherwise exclude persons with AIDS from normal social interaction and ban them from employment have all failed.¹⁴⁶ By contrast, Concord, California passed a referendum that repealed anti-discrimination protections, which is a less radical proposition.¹⁴⁷

Why did these initiatives fail while anti-gay civil rights initiatives have had almost uniform success? These results can be explained by one of the hypotheses set forth in the previous Part—voters appear to have considered AIDS initiatives too radical. These initiatives attempted to restrict the freedom and right of association of an unpopular group, persons with AIDS. Although gay men are among the most unpopular in the American electorate¹⁴⁸ (over 70% of the American public in the late 1980s disapproved of a gay life style),¹⁴⁹ the

¹⁴³ See *id.* at 79.

¹⁴⁴ See Dade County Ordinance No. 98-170, *supra* note 136.

¹⁴⁵ See *infra* Appendix F.

¹⁴⁶ This describes three California initiatives proposed in 1986 and 1988. See *id.*

¹⁴⁷ This describes the 1989 Concord, California referendum. See *id.*

¹⁴⁸ See Frank P. Zinni, Jr. et al., *The Structure and Dynamics of Group Politics: 1964–1992*, 19 POL. BEHAV. 247 (1997). Researchers used data from the NES Presidential Studies from 1964 to 1992 to study individuals' voting behavior in the context of attitudes towards 58 identifiable groups. The groups scoring the highest negative scores on the affective dimension were "urban rioters, radical students, black militants, gays, people who smoke marijuana, Palestinians, Vietnam war protesters and illegal aliens." *Id.* at 262. The researchers posited and demonstrated that group membership orients political opinion and attitudes. See *id.* at 270.

¹⁴⁹ A recent report on national public opinion toward gay men and lesbians show that from 1986 to 1989, the years during which the AIDS initiatives were proposed, 71% to 75% of those polled answered that they disapproved of same-sex relations. See ALAN S. YANG,

invasive curtailment of civil rights was deemed too extreme to be palatable to voters.

c. Language Initiatives: English-Only and Bilingual Education

The English-only initiatives have been successful almost every time they have been placed before the voters, mostly garnering overwhelming voter support.¹⁵⁰ Professor Jack Citrin's 1990 demographic analysis of California's English-only initiative shows it was supported by almost every segment of the electorate—liberals and conservatives, elites and non-elites.¹⁵¹

English-only initiatives fall into three categories. Most merely declare English as the official language of the jurisdiction and authorize the legislature to implement this affirmation.¹⁵² Such declarations have been described as symbolic because these laws reaffirm the status quo of English as the dominant language. The second genre of English-only laws, exemplified by the recently invalidated Arizona English-only constitutional amendment¹⁵³ and the Dade

NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 22 (1998). The data show that in 1996 disapproval had dropped to 56%. *See id.*

¹⁵⁰ *See infra* Appendix E. Raymond Tatalovich reports only one instance in which an English-only initiative was defeated, in Suffolk county. *See* Raymond Tatalovich, *Official Language: English-Only versus English-Plus*, in MORAL CONTROVERSIES IN AMERICAN POLITICS: CASES IN SOCIAL REGULATORY POLICY 196, 199 (Raymond Tatalovich & Byron W. Daynes eds., 1998). He reports that 41 counties and 15 cities have passed English-only laws, a total larger than the 9 initiatives reported in Appendix E. *See id.*

¹⁵¹ *See* Jack Citrin et al., *The "Official English" Movement and the Symbolic Politics of Language in the United States*, 43 W. POL. Q. 535, 544–48 (1990); *see also* Ana Celia Zentella, *Who Supports Official English, and Why?: The Influence of Social Variables and Questionnaire Methodology*, in PERSPECTIVES ON OFFICIAL ENGLISH 161, 166–67 (Karen L. Adams & Daniel T. Brink eds., 1992).

¹⁵² The Florida and Colorado constitutional amendments declare English the official language of the state and empower the legislature to enforce this provision. *See* FLA. CONST., art. 2, § 9 (1988); COLO. CONST. art. II, § 30a (1988). The California amendment is more complex, on the one hand mandating that the legislature "shall make no law which diminishes or ignores the role of English as the common language of the State of California," but, on the other hand, reassuring that it "is intended to . . . not supersede any of the rights guaranteed to the people by this Constitution." CAL. CONST. art. III, § 6 (1986).

¹⁵³ *See* ARIZ. CONST. art. 28, § 1 (1988); *see also* Ruiz v. Hull, 957 P.2d 984, 996 (Ariz. 1998) (en banc) (referring to the more restrictive Arizona constitutional amendment as "unique" and holding that the amendment violated the First Amendment by requiring that all state and local government officials and employees "act" only in English during performance of government business).

The constitutionality of the amendment was considered in *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated sub nom* Arizonans for Official

County (Miami) ordinance,¹⁵⁴ makes explicit the rejection of bilingual practices in the public sphere by adopting specific mechanisms that mandate state institutions and state actors to limit the use of language to only English. The third iteration of English-only laws encompasses those directed at specific governmental practices that accommodate languages other than English. In 1984, California passed an initiative that obligated the Governor to request that the federal government print voting instruments only in English.¹⁵⁵ In addition, in June 1998, California voters approved Proposition 227, an initiative that seeks to limit how bilingual education is implemented in California's state public system and mandates a one year transition period for non-English speaking children, regardless of their level of English proficiency.¹⁵⁶

This Part will apply available political science and sociological data to analyze these issues: (i) the demographics of English-only, (ii) status and intergroup conflicts, (iii) cultural and ideological motivations, (iv) the possible existence of nativism and anti-Latino discriminatory bias, (v) cultural minority's reactions, and (vi) the majority's purpose.

English v. Arizona, 117 S. Ct. 1055 (1997). The plaintiff, Yñiguez, a bilingual state official, brought suit arguing that the English-only constitutional amendment would prevent her from communicating with Arizona citizens who could not speak English well enough to communicate complex issues and transactions. Yñiguez relates that prior to English-only, as a bilingual, she would frequently use both Spanish and English to help many state clients. A co-plaintiff elected official argued that the constitutional amendment would prohibit him from communicating with elderly Mexican-American and Navaho-Arizona citizens whose primary or only language is not English. The Supreme Court remanded the dispute as moot because Yñiguez had quit public employment at the time of the Court's deliberation.

¹⁵⁴ See Metropolitan Dade County, Fla., Ordinance No. 80-128 (1980), reprinted in Yvonne Tamago, "Official Language" Legislation: *Literal Silencing/Silenciando La Lengua*, 13 HARV. BLACKLETTER J. 107, 122 n.106 (1997). The Miami ordinance prohibits "the expenditure of any county funds for the purpose of utilizing any language other than English or any culture other than that of the United States" and mandates that "all county governmental meetings, hearings, and publications shall be in the English language only." Max J. Castro, *The Politics of Language in Miami*, in CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S. 279, 286 (Mary Romero et al. eds., 1997) (quoting section 2 of the Dade County Ordinance). This ordinance was so broadly worded that it was interpreted to foreclose the City of Miami from putting up warning signs for tourists and Spanish-speaking employees. See JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF "ENGLISH-ONLY" 92 (1992).

¹⁵⁵ See California Proposition 38 (1984), reprinted in ALLSWANG, *supra* note 2, at 151.

¹⁵⁶ See 1998 Cal. Leg. Serv. Prop. 227 (West). Proposition 227 is being challenged in federal court by a coalition of citizen groups, among them Latinos and educators, under arguments that it violates the Equal Protection Clause and is pre-empted by federal bilingual education policies. The federal district court recently decided not to issue an injunction. See Valeria G. v. Wilson, 12 F. Supp.2d 1007 (N.D. Cal. 1998) (denying motion for injunction).

i. *Demographic Circumstances Giving Rise to English-Only*

Today, English language measures have typically been adopted in two different ways, in two different contexts. First, in several jurisdictions where cultural and bilingual minorities possess significant electoral strength (California, Florida, Arizona, and Colorado), the English-only measures would or would likely fail in the state legislature. In this handful of states, direct democracy instead has been used to adopt the provision into the state constitution. Second, in multiple states containing very few bicultural and bilingual minorities,¹⁵⁷ legislatures have adopted English-only statutes.¹⁵⁸ This Part concentrates on the first phenomenon.

All but one of the major English-only initiatives surveyed in Appendix E took place in jurisdictions with significant Latino,¹⁵⁹ Asian,¹⁶⁰ Native

¹⁵⁷ Political scientists Rodney Hero and Caroline Tolbert hypothesize that both states with racial/ethnic bifurcation (for example, California, Florida, Arizona, and Colorado) and racial homogeneity (as per most of the states enacting English-only by representative processes) result in anti-minority policy outcomes, such as English-only successes. They also posit and show through regression analysis that racial/ethnic composition and racialization dynamics are a more powerful predictor of policy outcomes than Elazar's civic culture hypothesis. See Rodney E. Hero & Caroline J. Tolbert, *A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 AM. J. POL. SCI. 851 (1996).

¹⁵⁸ English-only measures have also been adopted by statute in 23 states. See, e.g., ARK. CODE ANN. § 1-4-117 (Michie 1987); 1986 Ga. Laws 529; 5 ILL. COMP. STAT. ANN. 460/20 (West 1998); IND. CODE ANN. § 1-2-10-1 (Burns 1987); KY. REV. STAT. ANN. § 2.013 (Michie 1985); MISS. CODE ANN. § 3-3-31 (1987); NEB. CONST. art. I, § 27 (1985); N.C. GEN. STAT. § 145-12 (1987); N.D. CENT. CODE § 54-02-13 (Supp. 1987); S.C. CODE ANN. § 1-1-696-98 (Law Co-op. 1987); TENN. CODE ANN. § 4-1-404 (1987); VA. CODE ANN. § 7.1-42 (Michie 1987). Citrin points out that among the states that adopted English-only legislation through a representative process, rather than direct democracy, the Latino and Asian population was small and the number of foreign born persons was well below the national average. See Citrin et al., *supra* note 151, at 540; see also Hero & Tolbert, *supra* note 157, at 865; Tatalovich, *supra* note 150, at 196-97. Tatalovich points out that these states are mostly white. Minorities make up less than 3% of the population. See *id.* Under Hero and Tolbert's hypothesis, states with a large homogenous and non-multicultural white population share common civic values, which do not include minorities' perspectives. In these states, regression analysis shows that policy outcomes are most consistently anti-minority. See Hero & Tolbert, *supra* note 157, at 868. In these states, such an affirmation can not be said to be part of an intergroup battle between majority Euro-ethnic whites, who believe in "melting pot" assimilation, and those minorities who predominantly believe in multiculturalism. Rather, such measures would seem to represent an ideological affirmation, in the abstract, of that state's vision of what it means to be an American.

¹⁵⁹ According to population estimates projected from 1990 census data, in 1997 Latinos made up, respectively, 30.4% of the population in California, 21.4% in Arizona, 14.0% in Colorado, and 14.1% in Florida. See U.S. Dep't of Commerce, Bureau of the Census, *State*

American,¹⁶¹ or foreign born¹⁶² populations: Arizona; California (four); Colorado; and Florida (two). In each of these victories, Latinos and Native Americans predominantly voted against the constitutional initiatives.¹⁶³

Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 (Dec. 31, 1998) <<http://www.census.gov/population/estimates/state/st-98-1.txt>>; U.S. Dep't of Commerce, Bureau of the Census, *States Ranked by Hispanic Population in 1997* (Sept. 4, 1998) <<http://www.census.gov/population/estimates/state/rank/sorh97.txt>>.

¹⁶⁰ I will not include Asian Americans in this discussion although this is a predominantly bicultural minority. See *infra* note 163.

¹⁶¹ According to 1997 estimates based on the 1990 census, California has the largest and Arizona ranks third in Native American population. Per the 1990 census, seven of the largest ten reservations in terms of population are located in Arizona. See U.S. Dep't of Commerce, Bureau of the Census, *States Ranked by American Indian Population in 1997* (Sept. 4, 1998) <<http://www.census.gov/population/estimates/state/rank/sori97.txt>>; see also U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *POPULATION PROFILE OF THE UNITED STATES, CURRENT POPULATION REPORTS SERIES P-23-189: 1995*, at 50 (1995) [hereinafter CPRS P-23-189]. Both of these states have adopted English-only amendments.

¹⁶² One-quarter of California's and one-half of Dade County's population is foreign born. See METRO-DADE COUNTY, MIAMI DEP'T HUMAN RESOURCES, *DADE COUNTY CHARACTERISTICS* (1983); Abby Goodnough, *New York Region Steps Up Efforts for Bilingual Classes*, N.Y. TIMES, June 15, 1998, at B1.

¹⁶³ Latinos and Native Americans have been most consistently opposed to English-only measures, and for this reason the discussion that follows concentrates mainly on Latinos and, where applicable and data are available, Native Americans. Opposition by Asian Americans has been more varied. Data show that Asian Americans voted for California's English-only measure and for Proposition 227. See Citrin et al., *supra* note 151, at 545 (reporting that 61% of Latinos opposed California's English-only measure, but 67% of Asian Americans supported it). According to CNN-L.A. Times exit polls, 63% of Latinos opposed Proposition 227, while 57% of Asian Americans supported it. See Ethan Bronner, *Defeat of Bilingual Education is Challenged in Federal Court*, N.Y. TIMES, June 4, 1998, at A25; Amy Pyle et al., *Latino Voter Participation Doubled Since '94 Primary*, L.A. TIMES, June 4, 1998, at A1. However, in Arizona, polls taken two weeks before the election showed opposition to English-only as follows: Latinos (79%), Native Americans (75%), and Asian Americans (67%). See Karen L. Adams, *Ethnic and Linguistic Minorities in the Southwest: An Overview*, in PERSPECTIVES ON OFFICIAL ENGLISH, *supra* note 151, at 183, 195. Eighty-five percent of Latinos opposed the Dade County ordinance. There was no data for Asian Americans because they were not then present in Miami in significant numbers. See Castro, *supra* note 154, at 287.

The polls indicate that opposition to Proposition 227 among Latinos varies according to class and recent immigrant status. In Huntington Park, California, an area 92% Latino and a new immigrant enclave, Proposition 227 was rejected by a 3-to-1 margin. By contrast, in Montebello, California, with a 68% Latino population, mostly middle-class and second generation immigrants, Proposition 227 was rejected by only a 58% to 41% margin. See Pyle et al., *supra*. This result mirrors the stratification in the Latino community on immigration issues, as evidenced by the differing levels of opposition to Proposition 187. See generally DAVID G. GUTIERREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS AND THE POLITICS OF ETHNICITY* (1995).

Latinos are the largest growing minority group in the United States.¹⁶⁴ They already are, or will shortly be, the largest minority in California, Florida, Colorado and Arizona, the four states that have enacted state constitutional English-only amendments by initiative.¹⁶⁵ In California, where there have been three language initiatives, in 1986, 1988, and 1998, Latinos make up almost 30% of the population.¹⁶⁶ English-only measures were also successful in two cities with highly visible and active Latino and Asian-American communities: San Francisco and Dade County. In Miami, the 1990 Census showed that Latinos now constitute a *majority* of the population.¹⁶⁷ Yet, despite their growing numbers, Latinos are particularly vulnerable to electorate politics because, due to the low-level voter participation among these groups, their numbers are not reflected in electorate strength.¹⁶⁸

ii. *Status and Intergroup Conflicts*

The history of the English movement does not start in the Southwest with its legacy of conquest and subsequent racialization of Spanish-speaking Mexican Americans,¹⁶⁹ and where white Americans' colonization of Native Americans

Various researchers report support for English-only measures among African Americans. See Adams, *supra* note 163, at 195 (reporting that 80% of African Americans supported Arizona's English-only initiative); Citrin et al., *supra* note 151, at 545 (reporting that 67% of African Americans voted for California's English-only initiative, in relatively the same proportion as whites); Zentella, *supra* note 151 (reporting that 66% of African Americans voted for Florida's English-only initiative). But see Castro, *supra* note 154, at 287 (reporting that the Dade County ordinance was only supported by 44% of African Americans).

¹⁶⁴ Latinos are recording the largest gains in terms of aggregate numbers, while Asian Americans are the fastest growing minority in terms of percentage increase. See CPRS P-23-189, *supra* note 161, at 7, 9, 13.

¹⁶⁵ See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN FOR STATES, METROPOLITAN AREAS AND SELECTED COUNTIES: 1980-1985, CURRENT POPULATION REPORTS SERIES P-25, NO. 1040-RD-1, at 15-16 (1989).

¹⁶⁶ See *id.* at 69.

¹⁶⁷ See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS: DETAILED POPULATION CHARACTERISTICS, METROPOLITAN AREAS AND SELECTED COUNTIES, PC-90-1D1 (1993).

¹⁶⁸ In the recent 1998 California primary, Latinos made up 12% of California voters, twice their share in the 1994 election. See Pyle et al., *supra* note 163.

¹⁶⁹ Sociologists like Tomás Almaguer and Rodolfo Alvares emphasize that in what used to be Mexican territory—Colorado, California, Arizona, New Mexico, and Texas—Mexican Americans have been “racialized” into a subordinate group. Anglo-Americans have maintained their political and social dominance by various means: (1) *economic*: occupational segregation that limited accessibility to skilled jobs to white ethnics; (2) *legal*: interpretation of property laws that dispossessed Mexican citizens and prevented Asian Americans from land ownership;

involved a calculated program of annihilating Native-American languages. Rather, English-only was born in 1980 in Dade County, a community in which Cuban Americans "made good" and realized the American dream in large numbers. In Miami, Spanish speakers exert economic power¹⁷⁰ and political influence.¹⁷¹ Popular commentators refer to Miami as a city that is civically, economically, and culturally located in the Caribbean and not the United States.¹⁷²

The first wave of Cuban immigrants came to Miami in the 1950s as model immigrants and soon became model minorities. This group did not assimilate under the "melting pot" vision. Instead, as sociologist Max Castro observed, Cuban Americans were political exiles, predominantly middle class, well educated, mature in their cultural and political ideas, and intent on retaining their national dreams.¹⁷³ As a result, they believed strongly in holding on to all of the trappings of their cultural and national identity, including language.¹⁷⁴ In 1977, almost 90% of Cuban Americans spoke Spanish at home,¹⁷⁵ and their general economic success, and increasing profile as employers, also led to the exportation of Spanish outside the home for use in business and socially.¹⁷⁶

and (3) *ideology*: belief systems and stereotypes that perpetuate a mythology that Mexican and Hispanic culture is inferior to the Anglo-Saxon culture. See TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994); Rodolfo Alvares, *The Unique Psycho-Historical Experience of the Mexican-American People*, 52 SOC. SCI. Q. 15, 20–21 (1971).

¹⁷⁰ Max Castro reports that business formation among Cuban Americans in Miami has been spectacular, zooming from 3,447 in 1969 to 24,898 in 1982. See Castro, *supra* note 154, at 283. Cuban Americans in Miami are more likely to be business owners than Mexican Americans in Los Angeles. See *id.* at 290. This probably reflects the class and accumulated wealth disparities between the two groups.

¹⁷¹ The South Florida Latino delegation is highly influential in the Florida state legislature and is credited with ensuring that the Florida constitutional amendment remains law on paper only.

¹⁷² See generally JOAN DIDION, *MIAMI* (1987).

¹⁷³ See Castro, *supra* note 154, at 284–85.

¹⁷⁴ See *id.*

¹⁷⁵ Among Latinos in the United States, Spanish is predominantly a home language. A 1977 study (the closest available to the time of the ordinance) by the Cuban National Planning Council found that 91.9% of all Cubans in Miami spoke only Spanish at home, while another 4% spoke both Spanish and English, but mostly Spanish. See CUBAN NATIONAL PLANNING COUNCIL, *EVALUATION AND IDENTIFICATION OF POLICY ISSUES IN THE CUBAN COMMUNITY* (Guarione Diaz ed., 1980). But see Elizabeth A. Brandt, *The Official English Movement and the Role of First Languages*, in *PERSPECTIVES ON OFFICIAL ENGLISH*, *supra* note 151, at 215, 216 (noting that research indicates that the Spanish language is not generally retained among Latino communities in the Southwest).

¹⁷⁶ See CRAWFORD, *supra* note 154, at 95–97; Castro, *supra* note 154, at 281–83

Max Castro and James Crawford, who have published comprehensive studies on the English-only controversy, summarize the dynamics that caused the overwhelming English-only victory in Dade County as "Anglo backlash"¹⁷⁷ and "Hispanophobia."¹⁷⁸ Notwithstanding this catchy rhetoric, the picture that these two authors paint of the politics of English-only is complex and multi-layered. However, in both their versions, the concern of Euro-whites as to their declining dominance was a key element of the success of the English-only movement.

By 1980, Euro-whites were pressed to acculturate to a new Miami, a de facto bilingual city and a city in which Latino influence had become noticeable. In 1980, Spanish was heard in all public places and had become a constant reminder to many Euro-whites that their dominance was declining.¹⁷⁹ James Crawford reports that from 1970 to 1975 Spanish speakers, many of whom were "Marielitos," outnumbered English speakers twenty-six to one as newcomers to Miami.¹⁸⁰ English was "under siege." Residents complained that "we were treated like we were foreigners and they [Spanish speakers] were the legitimate person that was born here."¹⁸¹ Others would cite the use of Spanish in public spaces as "rude."¹⁸² Some resented that Spanish increasingly was required to qualify for jobs, even low-level jobs.¹⁸³ Terry Robbins, one of the leaders of the English-only movement, connected bilingualism to the United States becoming a

(reporting on a 1984 marketing study).

¹⁷⁷ See Max J. Castro, *On the Curious Question of Language in Miami*, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH LANGUAGE CONTROVERSY 178, 183 (James Crawford ed., 1992) [hereinafter LANGUAGE LOYALTIES] ("Miami—which has led the country in bilingual education and bilingual government services—in 1980 led the backlash against bilingualism.").

¹⁷⁸ See CRAWFORD, *supra* note 154, at 148–75.

¹⁷⁹ Many of the supporters of English-only would point to their irritation at being addressed first in Spanish and then in English by store clerks. One leader cited "[o]verseuse of Spanish" as "driving people up the wall." *Id.* at 99 (quoting interview with Enos Schera).

¹⁸⁰ See *id.* at 94. In addition, from May to September of 1980 Miami was undergoing the pains of incorporating 125,000 Cuban refugees from the Marielito boatlift, all of whom were Spanish speakers only. See David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 2, 245 (1990).

¹⁸¹ CRAWFORD, *supra* note 154, at 99 (quoting interview with Enos Schera, a leader of the Miami ordinance campaign).

¹⁸² See *id.* at 101 (recounting an incident where two Spanish speakers were standing in line during a lunch break and were interrupted by a non-Hispanic white who said to them: "This is America—speak English").

¹⁸³ See *id.* at 104–05. Crawford recounts a publicized incident where two African-American women were denied cleaning jobs because they failed to speak Spanish. The women are reported to have said, "They came over here. I don't see why I have to go through changes." See *id.* at 105; Celia W. Dugger, *2 Don't Know Spanish, Denied Jobs*, MIAMI HERALD, Oct. 25, 1983, at 1B.

"mongrel nation."¹⁸⁴ Finally, Emmy Shafer, a co-founder of the initiative movement, summed up what many were thinking: "I don't feel like I'm in Miami anymore. . . . This is not Cuba, and we're not going to put up with it anymore. I want to live in America again."¹⁸⁵ Cuban Americans and other Latino immigrants had turned the melting pot model on its head.

This range of sentiments, and the degree to which they were deeply personal and strongly held, hint at the wide support that English-only enjoyed. English-only was, and continues to be, unequivocally a grass roots movement. In 1980, two women, Emmy Shafer and Marion Plunske, heard each other's comments on a Miami radio talk show, called each other, and decided to organize a committee for the enactment of the English-only ordinance.¹⁸⁶ Within one week, this campaign had recruited many other like-minded people and had attracted funds, mostly from small donations. The movement took on its own momentum.

Outside of Miami, the pattern often has been similar. English-only measures have been employed, not primarily where merely Latinos or other non-English speakers are politically vulnerable, but where their presence has become visible.

iii. *Pro-English Cultural Motivations Reflected in Majority Campaign Literature*

Analysis of English-only campaigns helps to reveal why English-only initiatives are so overwhelmingly supported. Far from being an affirmation of a technical issue—what language is the polity to use in its official business—English-only initiatives reject the bilingual model for a variety of deeply held reasons touching upon self and group identity and the desire to re-assert a dominant ideology in an environment in flux. Rejection does not necessarily equate with racism or nativism, although, as discussed in the next Part, these elements also exist within the English-only movement.

Proponents' campaign literature emphasizes that "English must be the *official* language of the United States and the *only official* language."¹⁸⁷ In doing so, advocates celebrate the "melting pot" model of assimilation.¹⁸⁸ Official

¹⁸⁴ See CRAWFORD, *supra* note 154, at 102 (quoting interview with Terry Robbins).

¹⁸⁵ *Id.* at 106 (quoting Emmy Shafer's remarks to a Miami call-in radio talk show that were repeated as part of the ensuing campaign supporting the English-only ordinance).

¹⁸⁶ See Castro, *supra* note 154, at 286.

¹⁸⁷ Stanley Diamond, *English—the Official Language of California, 1983–1988*, in PERSPECTIVES ON OFFICIAL ENGLISH, *supra* note 151, at 111, 119.

¹⁸⁸ Heidi Tarver's analysis of the Official/U.S. English campaign literature reports that proponents directly make the analogy to the melting pot. See Heidi Tarver, *Language and Politics in the 1980s: The Story of U.S. English*, 17 *POLITICS & SOC'Y* 225, 237 (1989). Steve Symms, a Senator pushing English-only legislation in Congress, has stated: "The American

English literature claims that English is at the core of American national identity.¹⁸⁹ California's official English campaign literature states: "Our English language represents our history, our values, our loyalty to our State and Country. In a fundamental sense, our language is US."¹⁹⁰ English-only proponents have argued that a multi-language environment transforms America into a Tower of Babel that would disunify American nationality and undermine what makes America a successful country.¹⁹¹ One of the English-only pamphlets includes a quote by Theodore Roosevelt: "We have room for but one language here . . . for we intend to see that the crucible turns our people out of Americans, of American nationality, and not as dwellers in a polyglot boarding house."¹⁹²

To call these themes racist and nativist may be oversimplifying. These themes have struck a chord in the American electorate. In a recent study, Jack Citrin measures symbolic attitudes of what it means to be an American and finds these to be empirically distinct from measures of intolerance and prejudice.¹⁹³ This ideology of what it means to be an American is the most important source of opinions toward cultural minorities.¹⁹⁴ As the head of the English-only movement aptly pointed out after the victory in California, the American people had approved resoundingly an idea that to be an American involved a choice, a

people are impatient with us. All around them they see the results of the language policies Congress has imposed, policies that challenge the uniqueness of English in our national life. *We have removed the heat from the 'melting pot,' and the melting seems to have very nearly stopped.*" See *id.* at 232 (quoting "Fact Sheet: English Language Amendment" published by U.S. English) (emphasis in original). However, the monistic model of assimilation has never been a true sociological depiction of the integration of immigrant groups and is not the model of assimilation followed or accepted by the newest immigrant groups, Latinos and Asian Americans. An earlier work in this project provides an in-depth discussion of the melting pot imagery and its ties to dominant American cultural ideology and cultural and civic hegemony. See Lazos Vargas, *Homo[geneous] Americanus*, *supra* note 17.

¹⁸⁹ See Diamond, *supra* note 187, at 111.

¹⁹⁰ See Tarver, *supra* note 188, at 231–32 (quoting the U.S. English-California policy statement).

¹⁹¹ Even following the scandals that rocked U.S. English, see *infra* notes 200–203 and accompanying text, U.S. English's identification of language as a "fundamental bond through which a people [Americans] is held together" has been consistent and clear. Diamond, *supra* note 187, at 11. The U.S. English California Policy Statement states: "This bonding gives us harmony and unity." *Id.* (quoting U.S. English-California Policy Statement); see also FERNANDO DE LA PEÑA, *DEMOCRACY OR BABEL?: THE CASE FOR OFFICIAL ENGLISH IN THE UNITED STATES* (1991) (U.S. English publication).

¹⁹² Senator S.I. Hayakawa, *The Case for Official English*, in *LANGUAGE LOYALTIES*, *supra* note 177, at 94, 100 (quoting Theodore Roosevelt).

¹⁹³ See Jack Citrin et al., *American Identity and the Politics of Ethnic Change*, 52 J. POLITICS 1124 (1990).

¹⁹⁴ See *id.* at 1148.

choice for English.¹⁹⁵

iv. Nativism and Anti-Latino Resentment

Unfortunately, the English-only movement also hosts an undeniable component of nativism and anti-Latino feeling. In the Miami ordinance battle, exit polls conducted by the *Miami Herald* showed that more than half of all Euro-whites who voted for the initiative also hoped that the passage of English-only “would make Miami a less attractive place to live for Cubans and other Spanish speaking people.”¹⁹⁶ The same poll showed that 74% percent of all voters agreed with the statement “the recent refugee influx has made Dade a less desirable place to live.”¹⁹⁷ In another poll, 54% of Floridians agreed with the statement “[w]e are losing control of our state to foreigners.”¹⁹⁸ These polls reflect a mix of anti-immigrant, anti-foreign sentiments directed at Cuban Americans and Latinos in reaction to their rapid influx.¹⁹⁹

The anti-immigrant and anti-Latino element has been most visibly displayed in events that caused the implosion of U.S. English, a nonprofit political action group with an agenda to assist in the enactment of English-only statutes on both a state-by-state and national basis. Senator Hayakawa from California, after failing in the U.S. Congress to enact national English-only legislation, co-founded U.S. English with John Tanton, a conservative with links to conservative think tanks.²⁰⁰ Miami’s success had demonstrated that this was a political issue that could be exploited nationally. Polls conducted in the 1980s showed that almost 96% of all Americans believed that Americans should speak English. This group’s first success was the enactment in California of Proposition 63, the first of the “symbolic” English-only constitutional initiatives. This proposition won convincingly by a three-to-one margin.²⁰¹

¹⁹⁵ Stanley Diamond explicitly makes this claim. He argues that the wide margins of victory in California, Florida, and Colorado should be interpreted as a clear indication of the will of our citizens, that English must be the “only official language of the United States.” Diamond, *supra* note 187, at 119.

¹⁹⁶ Fredric Tasker, *Anti-Bilingualism Measure Approved in Dade County*, MIAMI HERALD, Nov. 5, 1980, at 11A.

¹⁹⁷ *Id.*

¹⁹⁸ CRAWFORD, *supra* note 154, at 113.

¹⁹⁹ See Castro, *supra* note 154, at 286–97 (describing in the anti-bilingualism movement a hope for stemming the Hispanic tide).

²⁰⁰ Stanley Diamond, an official of U.S. English, explains that U.S. English was founded in January 1983 by Senator Hayakawa with only 340 members. Four years later, membership had jumped to 340,000. See Diamond, *supra* note 187, at 111.

²⁰¹ See *id.* at 116–17; see also *infra* Appendix E.

The national U.S. English organization came under attack, however, when a memorandum by U.S. English's co-founder and behind the scenes leader, John Tanton, was published by the *Arizona Republic*.²⁰² This memorandum showed that at least John Tanton's stand on English-only was linked to his belief that Hispanics were "*homo progenitiva* [sic]," "a group that is simply more fertile," and that this group came in unimpeded at the border.²⁰³ This, he wrote, threatened "Whites [and] their power and control over their lives."²⁰⁴ Subsequently, Linda Chávez, a conservative Mexican American appointed by the Republican administration to head the Equal Employment Opportunity Commission, and who had become involved with U.S. English, made Tanton's anti-Latino and anti-immigrant position more patent. She resigned from the organization, believing her association with U.S. English to be a liability, and later described Tanton's joining of population control, immigration control, and language policy as giving the impression that U.S. English was biased against Latinos.²⁰⁵ Subsequently, reports have linked monies received by U.S. English to foundations interested in immigration reform and population control.²⁰⁶

Further, while nativism was not a patent force in Miami's civic politics prior to English-only, the adoption of the ordinance proved that it was a latent sentiment among many majority, long-time residents.²⁰⁷ Sociologist Max Castro remarked that the English ordinance was deeply divisive and fractured a cooperative political structure that elite whites had sought to construct in Miami.²⁰⁸ Initiatives of this kind fan smoldering intolerance and racial resentment, and following inevitable landslide votes, they become symbolic expressions of the majority's dominance that shatters the civic environment.

v. *Cultural Minority's Reactions*

Regardless of whether English-only measures are founded on pro-English cultural sentiments or on nativist or anti-immigrant feelings, it is clear that such

²⁰² See CRAWFORD, *supra* note 154, at 150–51 (quoting the *Arizona Republic* article publishing excerpts of John Tanton's confidential memorandum); JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 11–12 (1996) (quoting same).

²⁰³ CRAWFORD, *supra* note 154, at 151 (alteration in original).

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 157.

²⁰⁶ See *id.* at 152–55; STEFANCIC & DELGADO, *supra* note 202, at 10–19 (tracing the foundations that supported English-only with millions of dollars to groups that support eugenics and stringent immigration controls).

²⁰⁷ This is Crawford's general point. See CRAWFORD, *supra* note 154, at 90–120.

²⁰⁸ See Castro, *supra* note 154, at 287.

affirmances have an intense and concrete impact on the affected minority groups. When the dominant political group rejects—in this case resoundingly—the ideology upon which minority groups base their membership in the polity, the majority's vote becomes intensely personal. Minorities experience a rejection of their belonging to the American polity and, therefore, a rejection of self.²⁰⁹

Latinos recognize the dominance of English in the polity and its importance to their becoming well-established in the American community.²¹⁰ Most members of these groups not only speak English, but transact in English when in public roles, whether doing business or discussing public affairs.²¹¹ Contrary to public perception, these groups are generally assimilating into the American mainstream and learning English quickly.²¹² Like other immigrant groups, each generation of Latinos is less likely to speak Spanish and, within a generation or two, switch to English.²¹³

²⁰⁹ In their studies of the relationship between language and ethnic conflict, both Horowitz and Edwards have separately concluded that challenges to the status of one's language triggers deeply held and emotional feelings regarding one's sense of national identity and group worth. See JOHN R. EDWARDS, *LANGUAGE, SOCIETY AND IDENTITY* (1985); DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 219–24 (1985).

²¹⁰ In a 1985 survey, 98% of Latino parents in Dade County agreed that their children should “speak and write English perfectly,” compared to a 94% response rate for Anglo parents. See Mary Combs & John Trasvina, *Legal Implications of the English Language Amendment*, in *THE “ENGLISH PLUS” PROJECT* 30 (1986) (citing survey by Strategy Research Corporation).

²¹¹ Veltman's study showed that 75% of all Latino immigrants speak English frequently everyday. See CALVIN J. VELTMAN, *THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES* (1988).

²¹² Studies by Loo and Mar report that immigrants clearly recognize the importance of learning English as a way of improving their economic and social standing. See Chalsa Loo and Don Mar, *Desired Residential Mobility in a Low Income Ethnic Community: A Case Study of Chinatown*, J. OF SOC. ISSUES, Vol. 38, No. 3, 1997, at 95, 101. For example, Chinese immigrants are reported as saying that life is hard “[s]ince I can't speak and write English.” Chalsa M. Loo, *The ‘Biliterate’ Ballot Controversy: Language Acquisition and Cultural Shift Among Immigrants*, 19 INT'L MIGRATION REV. 493, 499 (1987).

²¹³ See 1 DAVID E. LOPEZ, *LANGUAGE MAINTENANCE AND SHIFT IN THE UNITED STATES TODAY: THE BASIC PATTERNS AND THEIR SOCIAL IMPLICATIONS* (1982). The rates at which immigrants shift to English depends on their age at the time they arrive in the United States (the younger, the more likely to switch to English) and length of residence in the United States (the longer here, the more likely the switch). See Calvin J. Veltman, *Modeling the Language Shift Process of Hispanic Immigrants*, 22 INT'L MIGRATION REV. 545, 556–61 (1988). Holding constant new influxes of immigrant populations, demographer Calvin Veltman projects that by the year 2031, few Latinos will speak Spanish. See Calvin Veltman, *The Status of the Spanish Language in the United States at the Beginning of the 21st Century*, 24 INT'L MIGRATION REV. 108, 121 tbl.5 (1990). Crawford's analysis of ethnolinguists studies is that all languages other than English, with the possible exception of Navaho, would die out within three to four

Navaho, which is spoken mostly in Arizona, is a language which tribes must struggle to preserve, as young children are growing up as predominant English speakers. The preservation of Navaho is central to the preservation of Navaho culture, as it is the main repository of Navaho culture and religion. One cannot exist without the other.²¹⁴

Given these realities, language minorities understand English-only initiatives as targeted at them and interpret the campaigns surrounding English-only as a rejection of their full membership in the community. For most members of these groups, language is a symbol of heritage and identity, rather than a barrier preventing their assimilation into the American polity.²¹⁵ For Latinos, even those who lose their ability to speak Spanish as they become more and more assimilated, Spanish is predominantly a home language²¹⁶ and is related with affective attitudes of self-identity and self-worth. Thus, language symbolizes deeply held feelings about identity and is deeply embedded in how individuals place themselves within society.

English-only laws are perceived as an affront to cultural and language minorities' status within the polity. In Miami, for example, the strength of the majority vote, the expression of an American ideology that left no room for Latinos' own sense of what it meant to be themselves and also to be an American, and nativism were perceived as a rejection of Latinos' membership in the civic community of Miami. For many Cuban Americans, the English-only enactment was the first inkling that they had that they were not welcomed as civic co-equal co-participants. Sociologist Max Castro reports that many in the Cuban-American community were hurt and bewildered: "I didn't realize how much our neighbors or coworkers disliked us and how much they resented us. Is that what they've been feeling all along?"²¹⁷

vi. *Majority's Purpose*

As has already been discussed, support for English-only measures can be traced to a complex and interwoven set of motivations. These include support for a common and unified culture, resentment of the success of other groups, and

generations were it not for immigration. See JAMES CRAWFORD, *BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY, AND PRACTICE* 60 (1989).

²¹⁴ See Adams, *supra* note 163, at 191–93; see also Ruiz v. Hull, 957 P.2d 984, 998 (Ariz. 1998) (taking special note that English is not a primary language for many Navaho).

²¹⁵ See Citrin et al., *supra* note 151, at 537 n.1; Citrin et al., *supra* note 193, at 1128–29; Tarver, *supra* note 188, at 232–33.

²¹⁶ See Jon Amastae, *Official English and the Learning of English*, in *PERSPECTIVES ON OFFICIAL ENGLISH*, *supra* note 151, at 199, 203–05.

²¹⁷ CRAWFORD, *supra* note 154, at 115.

discomfort with feeling like an outsider. Poll data analyzed by Professor Ana Celia Zentella reflect two additional related aspects of majorities' support for English-only measures.²¹⁸ First, how the question is framed is critical to eliciting majorities' response. In the poll data and subsequent survey Zentella devised, she shows that when questions are framed to draw attention to the implications of the majorities' vote on minorities, majorities become less supportive of English-only.²¹⁹ What was overwhelming support for the measure became a virtual tie when respondents were made to realize the impact of English-only on non-English speakers (slipping from 60/40 to 47/47).²²⁰ Another survey tracked similar results in how the bilingual education issue is posed to the voters.²²¹

This evidence demonstrates, once again, the empirical difficulty of using

²¹⁸ See Zentella, *supra* note 151, at 162–66.

²¹⁹ See *id.* Two different *New York Times*-CBS News national polls, which questioned 1,618 and 1,254 respondents, respectively, were conducted within ten months of each other, in June of 1986 and in May of 1987. In the 1986 poll, respondents were asked, “should state and local governments conduct business . . . in English?” Results tracked the same overwhelming majority numbers supporting English-only at the voting booth, with 60% of respondents approving the measure. See *id.* at 163. In the 1987 poll, the question asked was, “[w]ould you favor or oppose an amendment to the Constitution that requires federal, state, and local governments to conduct business in English and not use other languages, even in places where many people don’t speak English?” *Id.* The 1987 poll shows a tie at 47% among those approving and disapproving the measure. See *id.* Zentella observes that what is at play is that the 1986 version frames the language as Official English has—as an appeal to ideology that English *should* be the language of the government of the American people. See *id.* at 164. The 1987 version, however, spells out the *consequences* of an English-only proposition and how it would affect bicultural and bilingual citizens. See *id.*

Zentella followed up this analysis with a poll in which a total of 417 respondents in New York City were asked two questions. See *id.* at 166–67. One question asked if the respondent favored or opposed the constitutional amendment to make English the official language of the state of New York (the “English-only question”). See *id.* at 166. The other question spelled out the consequences and stated that it would eliminate bilingual education, bilingual ballots, and bilingual emergency operators (the “consequences question”). See *id.* Two questionnaires were used, with the questions presented in different order. See *id.* The results show that the questionnaires beginning with the English-only question again tracked voting results, with 60% supporting it. See *id.* at 166–67. The questionnaires beginning with the consequences question garnered significantly less support, with only 52% supporting it. See *id.*

²²⁰ See *id.* at 162–64.

²²¹ A poll of 251 respondents conducted by researchers of the University of Southern California showed similar results with respect to Proposition 227. When pollsters asked whether the respondent would support a bilingual education program that would limit special help to children who had limited English proficiency to one year, support for Proposition 227 (57%) switched to opposition (71%). See Stephen Krashen et al., *Bias in Polls on Bilingual Education: A Demonstration* (visited Apr. 19, 1999) <<http://ourworld.compuserve.com/homepages/jwccrawford/USCpoll.htm>>.

intent analysis to judge the propriety of direct democracy measures.

d. *Illegal Immigration*

In November 1994, California voters decidedly approved Proposition 187 by a margin of 59% to 41%.²²² This measure, now enjoined under federal court order and currently under appeal,²²³ aims to prevent persons lacking proper citizenship or residency status from obtaining public social services and health benefits, and their children from enrolling in public schools.²²⁴ It also requires public officials and school teachers to report individuals who they suspect of having no documentation.²²⁵

Proposition 187 has remained largely a California phenomenon.²²⁶ While similar initiatives have circulated in other states, including Florida, which has struggled with large immigrant inflows, none have yet made it onto the ballot.²²⁷ The politics and the social science surrounding its passage offer additional insights as to direct democracy efforts.

²²² See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (*LULAC I*) (memorandum of law).

²²³ See *League of United Latin Am. Citizens v. Wilson*, Nos. 94-7569 MRP, 94-7570 MRP, 94-7571 MRP, 94-7652 MRP, 95-0187 MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998) (enjoining implementation and enforcement of Proposition 187, §§ 1, 4-9), *appeal docketed*, No. 98-55671 (9th Cir. Apr. 21, 1998). Latino groups lobbied heavily the new Democratic California Governor Jim Davis to withdraw the State's appeal before the Ninth Circuit, urging him to "close this chapter of the culture wars." The Governor has decided to put the appeal on hold and instead has asked the Ninth Circuit's mediation service to handle the dispute. The Ninth Circuit still needs to respond to this novel task. See David S. Broder, *A Wedge that Keeps Splitting*, WASH. POST, Apr. 21, 1999, at A25; Dan Morain, *Debate Rises on Mediation of Proposition 187*, L.A. TIMES, Apr. 20, 1999, at A1.

²²⁴ See California Proposition 187, §§ 5(b), 6(b), 7 (1988), *reprinted in LULAC I*, 908 F. Supp at 787-90 (App. A).

²²⁵ See *id.* at § 5(c) ("If any public entity in this state to whom a person has applied for social services determines or reasonably suspects, based upon the information provided to it, that the person is an alien in the United States in violation of federal law . . . [t]he entity shall . . . notify . . . Immigration and Naturalization Services . . ."); see also *id.* at § 7(e) (providing similar provision covering public elementary and secondary schools).

²²⁶ It is also significant that a California initiative, once again, has sparked a policy debate at the national level. Following the political discussions which enveloped California's Proposition 187, the U.S. Congress embarked on a national reform of immigration laws.

²²⁷ In Florida, the measure failed to secure enough petition signatures to be placed upon the ballot. See Memorandum of the Florida Secretary of State, *supra* note 59.

i. Social Group Dynamics

Academic work has tried to explain why the anti-illegal immigrant measure proved more successful in California than elsewhere. A key point is made by a recent empirical study. Illegal immigrants are among the most unpopular groups in the American electorate, sharing this dubious distinction with gay men and lesbians, black militants, urban rioters, radical students, and Palestinians.²²⁸ However, unpopularity is only one component of three necessary requirements to trigger group prejudice ("an attitude toward a category of people"). Psychologist Fred Pincus states that there also must be a belief/ideology about that group, a triggering of emotional feelings, and a motivation to behave a certain way toward that group.²²⁹

Social group theorists have traditionally provided two hypotheses that account for the motivations that trigger majority animosity towards immigrants, which would help to explain why Proposition 187 emerged in California. The most dominant hypothesis has been intergroup conflict theory, which posits that long-time residents and legal and illegal immigrants vie for limited resources, such as jobs. This competition leads to conflict,²³⁰ which then gives rise to negative stereotypes regarding the outgroup.²³¹ The second explanation is a contact hypothesis. The isolation of immigrant groups and the pre-existing, generally negative, attitudes towards them perpetrate and foster hostility between the two groups.²³²

²²⁸ See Zinni et al., *supra* note 148, at 262. The researchers posited and demonstrated that group membership orients political opinion and attitudes. See *id.* at 270.

²²⁹ See RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION AND ETHNOVIOLENCE 49–50 (Fred L. Pincus & Howard J. Ehrlich eds., 1994) [hereinafter *CONTENDING VIEWS*].

²³⁰ The theory posits that, in certain social and market circumstances, competition exists, or groups perceive that competition exists, for limited resources. For example, African Americans and whites may compete for low-wage, low-skill jobs in rural locations where there is only one factory; or immigrant groups and African Americans may compete for a limited number of unskilled jobs in inner city areas. In these cases, each group constitutes a real threat to the other because they are directly competing in a zero-sum game. One group's gains will result in the other group's losses. See JOHN DUCKITT, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 96–109 (1992); SUSAN OLZAK, *THE DYNAMICS OF ETHNIC COMPETITION AND CONFLICT* 109–33 (1992); Fredrik Barth, *Introduction to ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* 9, 15–20 (Fredrik Barth ed., 1969).

²³¹ See DUCKITT, *supra* note 230, at 96–109; OLZAK, *supra* note 230 (reporting study premised on this theory and finding correlation between lynchings of African Americans and tight labor market conditions); Lazos Vargas, *Homo[geneous] Americanus*, *supra* note 17, at 1570–71 (providing summary of this theory of group formation).

²³² Rothbart & John describe contact hypothesis as follows:

Both theories seem to have some validity as applied to the relationships between Latinos and white non-Hispanics. Political scientists Hero and Tolbert used these alternative theories in an attempt to explain California's Proposition 187 result by analyzing to what extent there is a cleavage in the voting population between non-Hispanic whites and Latinos.²³³ They found that in counties in California with a significant bifurcated population, a high concentration of Latinos, and a high number of non-Hispanic whites, Proposition 187 was most strongly supported, even though Latinos voted against the measure in large numbers.²³⁴ Hero and Tolbert also found that there was strong support for Proposition 187 in homogenous counties.²³⁵

These findings support both the competition and contact hypotheses.²³⁶ Hero and Tolbert conclude that in a state like California, with a high racial/ethnic cleavage, results that disadvantage the minority group are more likely to occur.²³⁷

[T]he basic idea is that antagonistic groups generate unrealistically negative expectations of one another and simultaneously avoid contact. To the extent that contact occurs, the unrealistically negative perception of the group members are modified by experience. In other words, hostility is reduced as a result of increasingly favorable attitudes toward individual group members, which then generalize to the group as a whole.

Myron Rothbart & Oliver P. John, *Intergroup Relations and Stereotype Change: A Social-Cognitive Analysis and Some Longitudinal Findings*, in PREJUDICE, POLITICS, AND THE AMERICAN DILEMMA 32, 42 (Paul M. Sniderman et al. eds., 1993) (citations omitted).

²³³ See Hero & Tolbert, *supra* note 157, at 850–51.

²³⁴ See *id.* at 866.

²³⁵ See *id.*

²³⁶ While Hero and Tolbert admit that, on its face, Proposition 187 is not an anti-Latino measure per se, they nonetheless view immigration and English-only issues as closely associated with non-Hispanic whites' racial attitudes toward Latinos, which are heightened by inter-race/ethnic group political competition. Where there is a large presence of Latinos and other racial/ethnic minorities, there is increased political and civic competition. See Hero & Tolbert, *supra* note 157, at 868 & n.12. Hood and Morris concluded that non-Hispanic whites are more hostile to illegal immigration as the relative size of the illegal immigrant population in their area increases. See M.V. Hood III & Irwin L. Morris, *Give Us Your Tired, Your Poor, . . . But Make Sure They Have a Green Card: The Effects of Documented and Undocumented Migrant Context on Anglo Opinion Toward Immigration*, 20 POL. BEHAVIOR 1, 7–10 (March 1998). This finding supports the intergroup conflict theory. At the same time, non-Hispanic whites support legal immigration more as the relative size of the legal immigrant population increases. See *id.* The latter proposition supports the contact theory.

²³⁷ See Hero & Tolbert, *supra* note 157, at 867 ("[S]ocial pluralism tends to increase political competition. This is why many political concerns, dismissed by some scholars (including Elazar) as (mere) 'patronage' politics and not 'policy relevant,' take on the flavor of salient issues in the heterogeneous context.").

ii. Racial Formation and "Nativism"

Multiple commentators have argued that Proposition 187 has a racial basis. Specifically, Professors Kevin Johnson and Joe Feagin have called Proposition 187 a form of "modern" or "new" nativism.²³⁸ Feagin frames his argument historically and views Proposition 187 as the resurgence of a "100%" Americanization ideology prevalent from 1900 to the 1930s.²³⁹

Critical race theorists have argued that with respect to Asian Americans and Latinos the dominant methodology of racial formation centers around cultural dominance over and the foreignization of these groups.²⁴⁰ These cultures have been viewed as so different from the dominant Anglo-Saxon culture that they have been racialized as unassimilable, inferior, and incapable of fealty to the dominant Anglo-Saxon culture.²⁴¹

²³⁸ See Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 13 (Juan F. Perea ed., 1997) [hereinafter *IMMIGRANTS OUT!*]; Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in *IMMIGRANTS OUT!*, *supra*, at 169, 177–81.

²³⁹ See Feagin, *supra* note 238, at 37. Higham's *Strangers in the Land* traces the intellectual roots and historical events that gave rise to the Americanization movement of the 1920s known as the "100%." This group believed that to be an American required tracking Anglo-Saxon lineage. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 204–17 (1963). Higham believes that this movement could not have occurred without pre-existing stereotypes and attitudes held by the dominant Anglo-Saxon majority that cast foreigners as inferior morally, intellectually, and culturally. World War I reframed these ethnocentric attitudes into nationalistic and patriotic terms. During the War effort, ensuring that the "aliens" outside the Anglo-Saxon Protestant norm would become Americanized became a patriotic "service." See *id.* The version of English-only legislation at issue in *Meyer v. Nebraska*, 262 U.S. 390 (1927), is an example of "100%"-influenced, anti-German culture laws. See also Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 MINN. L. REV. 269, 329–30 (1992).

²⁴⁰ See generally RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (2d ed. 1993); Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186 (1985); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930–80*, 27 U.C. DAVIS L. REV. 555 (1994); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

²⁴¹ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). In *Chae Chan Ping*, the Court stated:

[T]he presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the

To show that Proposition 187 involved racialization dynamics, there must be a link between such racial ideology and the seemingly neutral and legitimate criticism of a federal policy—failing to control U.S. borders. Commentators have found the link in their analysis of how Proposition 187 came to be formed, examining the campaign imagery and its sources of financing. The preamble of Proposition 187 asserts that illegal aliens have caused “suffering [and] economic hardship” and “personal injury . . . by . . . criminal conduct” to the people of California.²⁴² These utilitarian assertions are controversial. Linda Bosniak points out that these arguments are acceptable anti-immigration arguments in a modern context where race-based allusions are too extreme to be supported.²⁴³

Because the facial language of Proposition 187 is arguably neutral, Professor Kevin Johnson examines the rhetoric of the Proposition 187 campaign as well as the ideological credentials of its leaders.²⁴⁴ Based on this evidence, he links Proposition 187 to racial nativism. For example, the campaign literature makes clear allusions to a bunker mentality, a fear that an invasion of brown hordes from third world countries would destabilize existing patterns of social structure and dominance.²⁴⁵ Similarly, Barbara Coe, one of the Proposition 187 drafters, warned that “the undocumented ‘invasion’ would culminate in ‘a Mexico-controlled California [that] could vote to establish Spanish as the sole language

character of an Oriental invasion, and was a menace to our civilization; . . . that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions

Id. at 595–96. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court expressed a similar belief that the Chinese were an unassimilable race:

Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests

Id. at 717; *see also* *Hirabayashi v. United States*, 320 U.S. 81, 96–97 (1943) (finding that state action applying curfew restrictions to Japanese Americans was reasonable and noting that Japanese Americans had remained isolated and unassimilable).

²⁴² 1994 Cal. Legis. Serv. Prop. 187, § 1 (West).

²⁴³ *See* Linda S. Bosniak, “Nativism” the Concept: Some Reflections, in *IMMIGRANTS OUT!*, *supra* note 238, at 279, 290.

²⁴⁴ *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–61 (1995); Johnson, *supra* note 238, at 177–81.

²⁴⁵ *See* Johnson, *supra* note 238, at 178. Johnson reports that the moniker for the campaign was “Save Our State,” or “SOS.” *See id.* at 177. Pamphlets claimed that Proposition 187 would stop the “ILLEGAL ALIEN invasion.” *See id.* at 178.

of California, 10 million more English-speaking Californians could flee, and there would be a statewide vote to leave the union and annex California to Mexico.”²⁴⁶ Johnson explains that this invasion imagery implies a loss of control over borders that calls to mind the invasion of the dominant Anglo-Saxon culture by inferior peoples.²⁴⁷

iii. *Money and Nativist Ideas*

Several commentators have attempted to demonstrate the racial and nativist motives underlying support for Proposition 187 by demonstrating that key supporters of the measure support other related measures and hold nativist beliefs. For example, Jean Stefancic constructs a link between funding, the key actors, and the anti-“third world” racial beliefs that infected both English-only and Proposition 187.²⁴⁸ James Crawford also traced a link of campaign funding between the English-only movement and the immigration reform movement.²⁴⁹ In addition, the John Tanton memorandum, already referenced, caused the implosion of the English-only movement to a coalition group that included U.S. English and Federation of Americans for Immigration Reform, and expresses concerns with the safety of U.S. borders. It adds that “Latin American migrants [could bring] the tradition of the *mordida* (bribe) [and] the lack of involvement in public affairs.”²⁵⁰

²⁴⁶ *Id.* at 179 (quoting Pamela J. Podger & Michael Doyle, *War of Words*, FRESNO BEE, Jan. 9, 1994, at A1). Another mover of Proposition 187, Harold Ezell, an INS official, justified Proposition 187 because “the people are tired of watching their *state run wild and become a third world country.*” *Id.* at 178 (quoting Daniel B. Wood, *Ballot Vote on Illegal Immigrants Set for Fall in California*, CHRISTIAN SCI. MONITOR, June 1, 1994, at 1).

²⁴⁷ *See id.* at 179.

²⁴⁸ *See* Jean Stefancic, *Funding the Nativist Agenda*, in IMMIGRANTS OUT!, *supra* note 238, at 119, 119–20, 131–33 [hereinafter *Funding the Nativist Agenda*]; *see also* STEFANCIC & DELGADO, *supra* note 202, at 142–57. For Stefancic and Delgado, conservative money and brains have been key to the success of the English-only and immigration reform movement. These movements focus on a single issue and know how to get their messages across. *See id.*

²⁴⁹ *See* CRAWFORD, *supra* note 154, at 157–58. Crawford traced significant contributions of almost \$6 million to both English-only and anti-immigration efforts by a single large donor. *See id.* This donor supports causes concerned with the explosion of population among third world countries and how this potentially threatens Anglo-dominant culture. *See id.* Pioneer Fund, a group that sponsors projects that promote eugenics, has also been connected with the Proposition 187 campaign. *See* Stefancic, *Funding the Nativist Agenda*, *supra* note 248, at 129–30.

²⁵⁰ Crawford, *supra* note 154, at 154–55 (quoting the John Tanton memorandum); *see also supra* text accompanying notes 202–06 (prior discussion of Tanton memorandum).

iv. *The Media*

Whatever their source, intergroup conflicts can easily be heightened through the use of the media.²⁵¹ Political candidates often find it effective to define their position in an electorate by proclaiming what they are against, rather than what they are for.²⁵² Illegal immigrants, a highly unpopular group, are an easy target for politicians who perceive that they can gain an electoral advantage by positioning themselves as being “against” such groups. Pete Wilson has been accused of doing just that in his campaign for governor of California when he showered the airwaves with television ads showing pictures of Mexicans physically overrunning and swarming around the U.S.-Mexico border. These ads framed Wilson’s campaign in intergroup terms, and, Johnson suggests, nativist terms as well.²⁵³ A vote for Wilson was a vote against illegal immigrants. Thus, Wilson encouraged the California electorate to vote on Proposition 187 based on a hostile intergroup dynamic, rather than on policy analysis. The media can frame complex issues in powerful, single-dimension terms. Images like those used in Wilson’s ads can “stir up” fears, hostile feelings, and racial resentment among certain members of the majority groups.

The opponents of Proposition 187, a wide coalition of liberal interests, attracted almost \$2 million in national funding in an attempt to counter these media messages.²⁵⁴ But the funding proved to be too little too late. The messages that Wilson and the Proposition 187 proponents had succeeded in communicating to whites were too powerful to be counteracted with single sound bites. A key moment, according to one observer, was when Mexican Americans were seen on television carrying the United Farm Workers flag and the Mexican flag in a protest march, further fueling anti-foreign sentiments.²⁵⁵

²⁵¹ See generally DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 229–60 (1996); DARRELL M. WEST, *AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952–1996*, at 151–83 (1993); Julie M. Duck et al., *Perceptions of a Media Campaign: The Role of Social Identity and the Changing Intergroup Context*, 24 PERSONALITY & SOC. PSYCH. BULL. 3 (1998) (measuring the dynamic of intergroup conflict with respect to media); V. Price, *Social Identification and Public Opinion: Effects of Communicating Group Conflict*, 53 PUBLIC OPINION Q. 197 (1989) (observing that media coverage in campaigns can encourage intergroup dynamics rather than individual responses).

²⁵² See RICHARD K. SCHER, *THE MODERN POLITICAL CAMPAIGN: MUDSLINGING, BOMBAST, AND THE VITALITY OF AMERICAN POLITICS* 99–115 (1998).

²⁵³ See Johnson, *supra* note 238, at 177–81.

²⁵⁴ See LYDIA CHÁVEZ, *THE COLOR BIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION* 179 (1998).

²⁵⁵ See *id.* at 80.

v. Racial Spillover Effects

Measures that focus on illegal immigrants may stir anti-foreign resentment that can spill over to harm Latino and Asian-American citizens who, as stated earlier, are racialized in the popular imagination as part of an un-American foreign element.²⁵⁶ A recent report from the Los Angeles County Commission of Human Relations (CHIRLA) indicated an increase of 23.5% in hate crimes against Latinos since the enactment of Proposition 187. An analysis examining complaints filed with the CHIRLA in the Los Angeles Mexican-American community post-Proposition 187 concludes that:

[Proposition] 187 has transformed everyday life for Latinos of every status, including those born here and those whose ancestors have lived in the U.S. for generations. The climate of hostility [engendered by Proposition 187] resulted in discrimination in business establishments, increased police abuse, heightened conflict among neighbors, and an increase in hate crimes and hate speech against Latinos There is abundant evidence of anti-Asian hate activity.²⁵⁷

In other ways, too, the divisiveness caused by Proposition 187 is still visible.²⁵⁸ As you drive into California on the interstate highway, a large billboard proclaims: "Welcome to California, the illegal immigrant state. Don't let this happen to your state."²⁵⁹

e. Affirmative Action

The final class of majority-minority conflict initiatives to be discussed are anti-affirmative action or so-called "civil rights" initiatives. California's Civil Rights Initiative (CCRI), also known as Proposition 209, is the prototype. In the wake of the Supreme Court's decisions in *City of Richmond v. J.A. Croson*²⁶⁰

²⁵⁶ Hood and Morris's data show that the politics affecting an identifiable, unpopular group—illegal immigrants—can spill over onto a closely associated racial/ethnic group—legal migrants. See Hood & Morris, *supra* note 236, at 12.

²⁵⁷ Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 9 (1995).

²⁵⁸ Politicians as well report that the California electorate has come to believe that Proposition 187 was too divisive. See CHÁVEZ, *supra* note 254, at 251–53.

²⁵⁹ Ruben Navarrette, *Immigrants Threaten Complacent Arizonans*, THE ARIZ. REPUBLIC, Aug. 16, 1998, available in 1998 WL 7791374; Ruben Navarrette, Jr., *Sign Company Cuts Off Immigration Message*, THE ARIZ. REPUBLIC, June 24, 1998, available in 1998 WL 7780299.

²⁶⁰ 488 U.S. 469 (1989).

and *Adarand Constructors, Inc. v. Peña*,²⁶¹ affirmative action programs are now on rocky ground. The Court has interpreted the Equal Protection Clause to allow for the establishment of affirmative action programs, but has required that they be able to pass strict scrutiny in order to ensure that such programs do not unduly burden whites' individual rights.²⁶² Commentators have criticized *Adarand* on the ground that the Court intruded into a clearly political matter that divides the polity, racially and also by gender.²⁶³ Because the judiciary improperly weighed in on a political controversy, it is arguably no coincidence that Proposition 209 became politically feasible only after *Adarand*.

In November 1996, California voters approved this controversial measure by a decided margin of 54% to 46% percent.²⁶⁴ Under the CCRI, it is impermissible to "discriminate against or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin."²⁶⁵ In December 1996, federal district court Judge Henderson issued an injunction preventing the implementation of CCRI on the grounds that it violated the Equal Protection Clause.²⁶⁶ In February 1997, the Ninth Circuit reversed Judge Henderson,²⁶⁷ and the Supreme Court denied certiorari.²⁶⁸

In November 1997, Houston voters defeated a measure that asked whether the city charter should be amended "'to end the use of affirmative action for women and minorities' in employment and contracting."²⁶⁹ A measure using the same preference language as Proposition 209 appeared on the November 1998 ballot in the state of Washington and was approved by a margin of 58% to 42% of voters, in spite of a contested campaign.²⁷⁰

²⁶¹ 515 U.S. 200 (1995).

²⁶² See *id.* at 237; see also *J.A. Croson*, 488 U.S. at 496–506.

²⁶³ See, e.g., Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 247–48, 287, 293–98 (1997). In *Democracy and Inclusion*, *supra* note 17, I argue that affirmative action exemplifies the epistemological gap between racial majorities and minorities that reflects how each group understands racial discrimination, and that the Court in deciding *J.A. Croson* and *Adarand* privileged as part of constitutional law whites' understanding of racial discrimination.

²⁶⁴ See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

²⁶⁵ 1996 Cal. Legis. Serv. Prop. 209(a) (West).

²⁶⁶ See *Coalition for Econ. Equity*, 946 F. Supp. at 1496.

²⁶⁷ See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

²⁶⁸ See *Coalition for Econ. Equity v. Wilson*, 118 S. Ct. 397 (1997).

²⁶⁹ Sam Howe Verhovek, *Houston to Vote on Repeal of Affirmative Action*, N.Y. TIMES, Nov. 2, 1997, at A28 (quoting Proposition A).

²⁷⁰ See Steven A. Holmes, *Washington State is Stage for Fight Over Preferences*, N.Y. TIMES, May 4, 1998, at A1; Sam Howe Verhovek, *From Same Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1.

i. *Ideology, Epistemological Divide, or Racial Resentment?*

Views on affirmative action divide along racial lines, with Americans generally holding strong opinions.²⁷¹ Whites oppose affirmative action by a two-to-one margin, while a much larger proportion of African Americans, three-to-one, believe that it is necessary.²⁷² Voting on Proposition 209 reflects this racial divide: 63% of whites supported it, while 74% of African Americans, 76% of Latinos, and 61% of Asian Americans opposed it.²⁷³ Women opposed Proposition 209 by a small margin (52% to 48%).²⁷⁴

The racial division on affirmative action, in part, reflects ideological differences. People will reasonably differ as to what equality of opportunity should mean in order for racial minorities and women, who have been subject to past discrimination, to have an equal, or at least fair, chance to succeed in today's modern world.²⁷⁵ Supporters, as well as opponents, of affirmative action claim to

²⁷¹ See KINDER & SANDERS, *supra* note 251, at 33 (analyzing 1986–1992 National Election Studies (NES) data and concluding that “[o]n racial matters, Americans, both black and white, are in possession of real opinions”). There is also increasing evidence that views on affirmative action are complex and multi-layered. See generally Symposium, *Twenty Years After Bakke: The Law and Social Science of Affirmative Action in Higher Education*, 59 OHIO ST. L.J. 663 (1998).

²⁷² The Gallup Poll's report on black and white relations in the United States showed that 82% of African Americans believed that government should increase or keep affirmative action programs while only 51% of whites were likely to say the same. See THE GALLUP POLL SOCIAL AUDIT, BLACK/WHITE RELATIONS IN THE UNITED STATES 14–15 (Executive Summary, June 1997). Seventy percent of whites believed that African Americans, instead, should focus on improving themselves. See *id.* at 15. In another poll, close to 80% of whites did not believe that “qualified minorities should receive preference over equally qualified Whites.” Cathleen Decker, *The Times Poll: Most Back Anti-Bias Policy but Spurn Racial Preferences*, L.A. TIMES, Mar. 30, 1995, at A1. The 1986–1992 NES survey reflects a greater gap: 90% of blacks versus 46% of whites believe that government has a role in ensuring equal employment opportunity; 68% of blacks versus 15% of whites support preferential hiring by race; 80% of blacks versus 30% of whites support college quotas. See KINDER & SANDERS, *supra* note 251, at 30.

²⁷³ See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 n.12 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

²⁷⁴ See *id.* In Washington, where the campaign targeted this sector of the electorate, the vote was virtually split among white women at 51% to 49%. See Sam Howe Verhovek, *In a Battle Over Preferences Race and Gender are at Odds*, N.Y. TIMES, Oct. 20, 1998, at A1; Verhovek, *supra* note 270.

²⁷⁵ Popular commentary cites the violation of meritocratic values as the reason for erosion of popular support. See DINESH D'SOUZA, THE END OF RACISM 289–336 (1995) (arguing that affirmative action is equivalent to group quotas); Daniel Yankelovich, *How Changes in the Economy are Reshaping American Values*, in VALUES AND PUBLIC POLICY 16, 29–33 (Henry J. Aaron et al. eds., 1994) (advocating that because Americans view individualism and

favor a system in which all should receive rewards according to merit, and not on the basis of racial preferences, whether white or black.

This portrayal of merit and opportunity also reflects diverging beliefs regarding the existence and persistence of discrimination.²⁷⁶ Many whites and men do not perceive the constant, incipient, and structural discrimination that many minorities, particularly racial minorities, experience.²⁷⁷ Thus, the "privilege" of not experiencing discrimination makes its existence, and the necessity to address it, less apparent to many whites and men.²⁷⁸ This transparent

meritocracy as very high values, policymakers reconsider affirmative action policies).

²⁷⁶ See John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 323, 333 (1994) (arguing that white American's narrative of "neutral standards" serves to distance them from advantages received); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 308-15 (1990) (explaining that the affirmative action debate is framed in the rhetoric of white innocence and that this avoids dealing with problems of unconscious racism).

²⁷⁷ Racial minority's *experience* with racism leads them to know that racism is a systemic and pervasive phenomenon. The following percentages of African Americans, Latinos, and Asian Americans, respectively, perceive prejudice towards their group: 84%, 90%, 95%. See HARRY H.L. KITANO & ROGER DANIELS, *ASIAN AMERICAN: EMERGING MINORITIES* 195 (2d ed. 1995). Psychologists report that African Americans who have made it socially and economically still feel rage at the constant prejudice, discrimination, and concomitant loss of dignity they experience episodically and sometimes daily. See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1992 ed.). Professor Davis has used the term daily racial "microaggressions." See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); see also JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 15 (1994) ("When our respondents talk about being black in a country dominated by whites, they do not speak in abstract concepts of discrimination or racism learned only from books, but tell of mistreatment encountered as they traverse traditionally white places."). Hochschild finds that the ability or willingness to recognize racist treatment varies according to class. See JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 72-75 (1995) (recompiling and analyzing attitudinal data showing the various ways in which African Americans are conscious of ongoing systemic discrimination against them and yet continue to strive for and pursue the "American Dream" and finding that more well-off African Americans see racial discrimination than do poor African Americans).

²⁷⁸ See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 35-70 (1993) (reporting the great social distance between white women and race groups); STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7-24 (1996); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 969-71 (1993); see also Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinctions Between Color-Blind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1030-36, 1057-59 (1997) (critiquing the Court's approach in affirmative action cases on the basis that it permits and encourages transactional discrimination).

“privilege” also includes social and business norms that assume the white and male perspective as the norm.²⁷⁹ The perspective of whites and men with respect to the existence of discrimination reflects a way of looking at the world that is markedly different, arguably irreconcilable, from what racial minorities and women report they experience. Thus, this gap is not only ideological; it is epistemological, reflecting a knowledge gap of the social world that is reflective of occupying a different social position, one of privilege and freedom from discrimination.²⁸⁰

Recent extensive work based on the 1986 to 1992 National Election Survey (NES)²⁸¹ by Professors Kinder and Sanders provides evidence that the opinion divide on affirmative action captures white “racial resentment.”²⁸² Kinder and Sanders describe racial resentment as:

a contemporary expression of racial discord, distinguishable from the biological

²⁷⁹ Martha Minow writes:

[A]tribution of difference . . . locates the problem in the person who does not fit in rather than in relationships between people and social institutions. The attribution of difference hides the power of those who classify and of the institutional arrangements that enshrine one type of person as the norm, and then treat classification of difference as inherent and natural while debasing those defined as different. . . . [W]hen public or private actors label any groups as different[, it] disguises the power of the namers, who simultaneously assign names and deny their relationships with and power over the named. Naming another as different seems natural and obvious when . . . social practice, and communal attitudes reinforce that view. . . .

MINOW, *supra* note 28, at 11.

²⁸⁰ By referring to a “white epistemology” in this context, I do not mean to imply that all whites oppose affirmative action or that all whites would hold on to meritocratic and individualistic mythologies to deny the past and present suffering of racial minorities. What I mean to convey is that opposition to affirmative action can be understood as a cognitive issue regarding the existence and extent of racial discrimination, as well as an ideological issue that supports white “racial innocence.” See *supra* notes 275–76.

²⁸¹ The NES sample of 2,176 respondents included extensive questions designed to measure the relationship between two current political issues that Kinder and Sanders believed to be indicative of modern “subtle” prejudice—affirmative action and aid to welfare recipients. They designed questions that attempted to measure: (1) self-interest versus group interest, (2) racial resentment, and (3) ideological beliefs. See KINDER & SANDERS, *supra* note 251, at 14–16.

²⁸² Kinder and Sanders formulated this term in response to criticism of their earlier formulation of “symbolic” racism. See *id.* at 293–94. Their analysis found little correlation between attitudes on affirmative action and socio-economic status or education. See *id.* at 90–91. The study also did not find significant correlation between whites’ position on affirmative action and indicia of self-interest. See *id.* at 89.

racism that once dominated American institutions and white opinion. . . . [R]acial resentment features indignation as a central emotional theme, one provoked by the sense that black Americans are getting and taking more than their fair share. Finally . . . racial resentment is thought to be the conjunction of whites' feelings toward blacks and their support for American values, especially secularized version of the Protestant ethic. Today . . . racial resentment takes primarily one form, a combination of racial anger and indignation, on the one hand, and secularized versions of the Protestant ethic, on the other.²⁸³

Kinder and Sanders found opinions on affirmative action to be significantly influenced by what whites as a group perceived to be the impact on the group of affirmative action policies.²⁸⁴ The single most significant correlate was Kinder and Sanders's measure of whites' "racial resentment." This measure sought to capture subtle hostility based on general beliefs that reflect stereotypes and unsympathetic positions towards blacks.²⁸⁵ Kinder and Sanders conclude that

²⁸³ *Id.* at 293–94.

²⁸⁴ More than 40% of whites thought that affirmative action had a negative impact on whites by reducing job chances or promotions. *See id.* at 54. A slightly higher percentage of whites believe that affirmative action policies operate to disadvantage them, relative to blacks, in entry into elite schools for their children. *See id.* Kinder and Sanders examine the data and conclude that such perceptions are not realistic. *See id.* at 64–68.

²⁸⁵ The full complement of questions reads as follows:

- (1) Most blacks who receive money from welfare programs could get along without it if they tried.
- (2) Over the past few years, blacks have gotten less than they deserve.
- (3) Government officials usually pay less attention to a request or complaint from a black person than from a white person.
- (4) Irish, Italian, Jewish and many other minorities overcame prejudice and worked their way up. Blacks should do the same without any special favors.
- (5) It's really a matter of some people not trying hard enough; if blacks would only try harder they could be just as well off as whites.
- (6) Generations of slavery and discrimination have created conditions that make it difficult for blacks to work their way out of the lower class.

Id. at 107.

Kinder and Sanders's analysis leads them to conclude that this positive correlate for racial resentment, which captures racial attitudes based on stereotypes, plays not the only, "but *by a fair margin . . . the most important*" role in forming white public opinion on racial issues, like affirmative action. *See id.* at 124. Fred Pincus highlights that these questions include questions that indicate the continuing significance of traditional prejudice, such as: "Over the past two years, blacks have got more than they deserve" and "Negroes/blacks shouldn't push where they're not wanted." Fred L. Pincus, *Does Modern Prejudice Exist?: A Comment on Pettigrew and Roth*, in *CONTENDING VIEWS*, *supra* note 229, at 69, 72. Responses demonstrate low but

their racial resentment measure is a coherent and stable measure of prejudicial attitudes. They also found that white respondents were more likely to curtail responses when the interviewer was African American, which they cited as further demonstrating white respondents' consciousness that their answers demonstrated prejudicial attitudes.²⁸⁶ Jennifer Hochschild presents a more complex and ambivalent view.²⁸⁷ In her Proposition 209 analysis, data show white discomfort with the way in which affirmative action was applied, with one-fourth who voted for the referendum preferring a "mend it, don't end it" option.²⁸⁸ For the vast majority of whites, affirmative action is not a top political issue affecting the choice of candidates.²⁸⁹ Hochschild concludes that affirmative action opinions among whites are "malleable" and hold instead symbolic value.²⁹⁰

ii. *Exploiting the Racial Divide by Framing the Issue*

Lydia Chávez's study of Proposition 209 documents that, as with previous measures, the precise framing of the issue was critical to its success.²⁹¹ Women and racial minorities made up 70% of the California electorate,²⁹² and affirmative action programs are designed to benefit this large group. Thus, the politics of self-interest favored the opponents. The ad campaign was evenly matched—civil rights groups opposing Proposition 209 put together a \$3.1 million campaign kitty, amply funded from the beginning of the campaign.²⁹³ Yet, the electorate approved Proposition 209.

California poll data showed that voters would respond very differently to affirmative action measures, depending on how they were worded. When voters were asked whether they favored a ban on "preferential treatment," more than 78% agreed.²⁹⁴ However, when voters were asked if they would support a ban on affirmative action programs, only 31% supported it.²⁹⁵ Using these data,

positive correlations with opinions on affirmative action and other social welfare issues. *See id.*

²⁸⁶ *See* KINDER & SANDERS, *supra* note 251, at 113.

²⁸⁷ *See* Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997 (1998).

²⁸⁸ *See id.* at 1001.

²⁸⁹ *See id.* at 1001–02.

²⁹⁰ *See id.* at 1004.

²⁹¹ *See* CHÁVEZ, *supra* note 254, at 251–53.

²⁹² *See id.* at 88.

²⁹³ *See id.* at 252.

²⁹⁴ *See id.* at 99 (reporting results from April 1995 Louis Harris poll).

²⁹⁵ *See id.* Kinder and Sanders's 1990 experiment captured this effect as well. They showed that if affirmative action poll questions were framed in the language of "preferences"

drafters consciously phrased Proposition 209 in language that would provoke the greatest support among whites, as a ban on preference and quotas.²⁹⁶

The summary to the ballot is the key cue among voters. Studies have shown that voters routinely fail to inform themselves fully on the issues, and that cues, such as the ballot summary, are informational shortcuts relied on heavily to determine a vote.²⁹⁷ In California, the attorney general formulates the summary for direct democracy initiatives. Daniel Lungren, the Attorney General at the time of Proposition 209, publicly supported Proposition 209. It is therefore not surprising that the summary his office prepared used the language of preferences.²⁹⁸ Although Lungren's actions were challenged in court, the appellate court allowed Lungren's formulation to stand.²⁹⁹

Chávez reports that many minorities were confused not only by the language, but also by the media messages of the proponents of Proposition 209.³⁰⁰ Proponents appropriated the language of "civil rights" in the title of the proposition.³⁰¹ Advertising for Proposition 209 used images of Martin Luther King.³⁰² Ads stated that Proposition 209 would unify Californians and mostly used voices of female narrators.³⁰³ One ad in particular was aimed at white women. It portrayed the story of Janice Camarena, a white woman who was denied admission into a remedial English class because the program had been designed for Latino and African-American students.³⁰⁴ Camarena appeared opposing quotas and saying that her children were not part of any race, just the

and "quotas," this phrasing would trigger "racial sentiments powerfully, calling up the sympathies and resentments whites feel toward affirmative action's intended beneficiaries. [With such phrasing] public opinion on affirmative action becomes a kind of referendum on the moral character of black citizens." See Donald Kinder & Linda Sanders, *Mimicking Political Debate with Survey Questions: The Case of White Opinion on Affirmative Action for Blacks*, 8 SOC. COGNITION 73, 96 (1990).

²⁹⁶ See *supra* note 265 and accompanying text.

²⁹⁷ See MAGLEBY, *supra* note 21, at 122–44.

²⁹⁸ See CHÁVEZ, *supra* note 254, at 145–46; Tom Desslar, *AG's Role in Ballot Process is Criticized*, 109 L.A. DAILY J. 168, at A1 (1996).

²⁹⁹ The appellate court found it "immaterial whether the attorney general supports or opposes Proposition 209." Lungren v. Superior Court, 55 Cal. Rptr. 2d 690 (3d Dist. 1996).

³⁰⁰ See CHÁVEZ, *supra* note 254, at 187–88, 217–19 (describing several Proposition 209 advertisements).

³⁰¹ See *id.* at 20 (discussing the "California Civil Rights Initiative").

³⁰² See *id.* at 217–19 (describing use of footage of Martin Luther King Jr.'s "I have a dream" speech before the Lincoln Memorial). Connerly fired the individual responsible for these ads. See *id.* at 220–22.

³⁰³ See *id.* at 217 (The last line in one announcement states: "Equal opportunity *without* quotas. Yes! Proposition 209. Bring us together.").

³⁰⁴ See *id.* at 216–17.

human race.³⁰⁵ Finally, Ward Connerly's role as main spokesperson and leader of Proposition 209 diffused anti-black charges and served to reassure voters that Proposition 209 was in fact a pro "civil rights" law.³⁰⁶

C. Sorting Out the Causes and Effects of Anti-Minority Results in Initiatives and Referendums

After examining the narratives of Part B and the work of social and political scientists presented in Part A above, this section re-addresses the question posed by Professor Bell: do anti-minority initiatives succeed because majorities "vote their fears and prejudices, especially when exposed to expensive media campaigns"?³⁰⁷ It then assesses the impact of these initiatives on minorities. As will be seen, neither issue is susceptible to a simple analysis.

1. The Dynamics of Anti-Minority Initiatives and Referendums

Social scientists have repeatedly used three sets of concepts in seeking to describe and explain majorities' actions towards minority groups: racial prejudice/racial resentment, ideology, and intergroup conflicts. It is virtually impossible to untangle these sets of motivations. Each is complex, and each plays a role in anti-minority direct democracy measures.

a. Reconciling a Civic Culture of Fairness and Consistent Anti-Minority Results

The discussion of initiatives in Part III.B supports Cronin's and Zimmerman's contentions that Americans resist radical movements that disadvantage minorities. The AIDS quarantine initiatives were defeated in California.³⁰⁸ Similarly, the more radical form of initiatives resisting school desegregation was defeated in Arkansas.³⁰⁹ In addition, the more extreme versions of anti-gay initiatives, such as Oregon's equating homosexuality with pedophiles, went down in defeat.³¹⁰ Arizona's more extreme English-only constitutional amendment initiative, recently struck down in *Ruiz v. Hull*,³¹¹

³⁰⁵ See *id.* at 217–18.

³⁰⁶ See *id.* at 74–75.

³⁰⁷ Bell, *supra* note 82, at 20–21.

³⁰⁸ See *supra* notes 145–47 and accompanying text; see also *infra* Appendix F.

³⁰⁹ See *supra* notes 117–18 and accompanying text.

³¹⁰ See *supra* notes 131–35 and accompanying text.

³¹¹ 957 P.2d 984 (Ariz. 1998).

passed by a narrow margin, compared to the three-to-one margin that California's more moderate English-only initiative enjoyed.³¹² Finally, polling showed much greater support for anti-affirmative action measures when they were framed in terms of denying groups special rights than when presented in a more radical fashion as a prohibition on affirmative action.³¹³ Based on this evidence, it can be asserted that Americans tend to vote against initiatives that are patently unfair toward a minority group.

At the same time, the evidence also suggests a strong core cultural conservatism. Americans overwhelmingly believe in certain ideologies: that individual property rights imply an autonomy of decisionmaking regarding persons with whom we are permitted to associate;³¹⁴ that traditional families are our social foundation;³¹⁵ that English holds a primary place in our political life;³¹⁶ that merit and hard work should be the primary ways that rewards are meted out in our society; and that the government has a limited role in facilitating fair treatment.³¹⁷ These cultural ideologies are closely tied to an American civic culture.³¹⁸

These two observations are not contradictory. Rather, they help explain a central feature of initiatives and referendums. A key piece of American ideology is fair play and a belief that all persons are created equal. Thus, it would be considered anti-American to deprive a member of another group of a benefit out of animus or spite. The results of initiatives show that Americans will vote on a fairly consistent basis to arrest the advancement of minority's civil rights and status. However, most Americans will so vote only where the distinction disadvantaging the minority can seemingly be drawn on a principled and fair basis. That is, an electorate that might resist an initiative explicitly legitimizing the deprivation of jobs to gay men on the basis of their sexual orientation might quickly adopt an initiative accomplishing the same end through the use of language denying gay men "special privileges."³¹⁹ Similarly, the majority that voted to protect the property rights of persons to lease to any person of their choosing, without government interference, was unwilling to concede that this

³¹² See *supra* notes 152–55 and accompanying text; see also *infra* Appendix E.

³¹³ See *supra* notes 294–95 and accompanying text.

³¹⁴ See *supra* notes 110–14 and accompanying text.

³¹⁵ See *supra* notes 138–40 and accompanying text.

³¹⁶ See *supra* notes 187–95 and accompanying text.

³¹⁷ See *supra* notes 271–72 and accompanying text.

³¹⁸ In my previous work, I make the argument that American civic culture is inextricably linked with racial formation. See Lazos Vargas, *Homo[geneous] Americanus*, *supra* note 17.

³¹⁹ See *supra* notes 134–35 and accompanying text.

ideology could harm racial minorities.³²⁰ Thus, while the American electorate resists radical formulations that explicitly threaten minorities' status, this concern for the quality of minorities' citizenship is counterbalanced by a core conservative civic culture.

b. *Prejudice, Racial Resentment, or Ideological Battles?*

In the last two decades, social science has shown that prejudice as we once knew it—blatant, violent, close, and direct—is no longer the norm in how whites express what social scientists still call “prejudice” or “racism.”³²¹ Nonetheless, prejudice of various kinds continues to exist and plays a role in the anti-minority initiatives. Professor Young-Bruehl's recent exhaustive study instructs that we should think and speak of prejudice in the plural, as prejudices, because attitudes and ideologies that create prejudice differ with respect to each unpopular group.³²²

Some of the evidence lies in isolated events. Tanton's “population explosion” memorandum worrying over the Latino physical invasion, “homo progenitivus,” and civic corruption by the takeover of *la mordida* is jarring.³²³ Also, the founders of Proposition 187 appeared to be motivated by raw nativism.³²⁴ To some, these are evidence of isolated prejudiced statements that motivated some but not all.³²⁵ To others, these are brief glimpses of a way of thinking that infected the entire process.³²⁶

There is evidence of more sustained and blatant prejudice in two cases with respect to illegal immigrants and gay men and lesbians, two of the most unpopular groups in the polity.³²⁷ Prejudice against illegal aliens, particularly

³²⁰ See *supra* notes 113–14 and accompanying text.

³²¹ See generally John B. McConahay & J. Hough, *Symbolic Racism*, 32 J. SOC. ISSUES 23, 23–46 (1976); Thomas F. Pettigrew, *New Patterns of Prejudice: The Different Worlds of 1984 and 1964*, in *CONTENDING VIEWS*, *supra* note 229, at 53; David O. Sears, *Symbolic Racism*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 53, 55–56 (Phyllis Katz & Dalmas A. Taylor eds., 1988); see also *supra* notes 280–84 and accompanying text.

³²² See ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 1–23 (1996).

³²³ See *supra* notes 202–06, 250 and accompanying text.

³²⁴ See *supra* notes 244–46 and accompanying text.

³²⁵ There are also counter-examples of politicians attempting to inject a more reasoned tone into controversial debates. For example, in contrast to Pete Wilson's opportunistic positioning, Governor Gary Locke, in the Washington affirmative action debate, cast the affirmative action debate as not one involving racial conflict, but rather as one of “progress women have made in getting equal pay for equal work.” Verhovek, *supra* note 274, at A1.

³²⁶ The position of some race theorists could be so interpreted.

³²⁷ See *supra* note 148 and accompanying text (citing study based on NES survey data).

Mexican nationals, and prejudice against gay men can be expressed freely. Overt appeals to prejudices against these two groups figured prominently in mobilizing the vote on Proposition 187 and the Dade County ordinance. Pete Wilson's "brown horde" imagery in ads was effective in positioning him as the anti-illegal immigrant candidate.³²⁸ Anita Bryant's appeals to Miami's religious community centered on the theme that children could not be safe around gay men.³²⁹ Hers was an explicitly homophobic appeal. Finally, the polls in Miami captured nativist resentment when a majority of Anglo voters expressed their desire that after English-only they hoped Miami would be less hospitable for Cubans and other Latinos.³³⁰

Following Proposition 187, there was evidence that once prejudice is unleashed it cannot be easily contained. Post-Proposition 187, Mexican-American and Asian-American citizens have experienced greater hate crime.³³¹ Post-English-only, Florida's Latinos experienced a similar hostile environment.³³²

Finally, in the case of Proposition 209, Kinder and Sanders have found consistent evidence that anti-black "racial resentment," a measure that captures whites' racial stereotypes in constructing their political-ideological positions, correlates with whites' opposition to affirmative action.³³³ This theory, as applied to majority-minority initiatives described in Part III.B, posits that minorities are rejected because whites have engaged in group-based (what these researchers would call "racial") ideological thinking around which majorities have structured, in ways that are acceptable and masked, inchoate racial/ethnic fears and prejudices. These ideologies are expressions of racial resentments, and not just ideas, because such ideologies support continued stereotypical thinking about these unpopular groups. For example, in the case of gay men and lesbians, coherent ideologies of social morality and propriety can also mask ideologies that gay men and lesbians are deviants who corrupt children; in the case of cultural and language minorities, the white ethnic narrative of assimilation can mask Anglo attitudes of superiority and intolerance for Latino and Asian cultures; with respect to blacks, the Protestant work ethic can mask assumptions that this group does not want to play by the rules of meritocracy; in the case of California's Proposition 187, valid concerns about national borders can mask

³²⁸ See *supra* notes 252–53 and accompanying text.

³²⁹ See *supra* notes 137–40 and accompanying text.

³³⁰ See *supra* notes 196–99 and accompanying text.

³³¹ See *supra* note 257 and accompanying text.

³³² See *Designation of Official Language Already Generating Problems*, ORLANDO SUN-SENTINEL, Dec. 11, 1988, at 4F (reporting and describing incidents of verbal and physical aggression towards Spanish speakers).

³³³ See *supra* notes 281–86 and accompanying text.

nativist prejudices.

Kinder and Sanders's work has been controversial. Other social scientists argue that the assumptions made as to the significance of white responses rejecting positions that favor minorities are not necessarily explained by latent racism.³³⁴ Rather, it could be suggested, these responses are products of deep ideological differences. Virtually all of the direct democracy measures can be described in such terms: the protection of owners' property rights and autonomy from government interference; the need to prevent homosexuals from tarnishing our moral community; the need to ensure that all Americans share a common language; the need to protect U.S. borders and prevent illegal aliens from bankrupting public services; the need to prevent minority group members from securing unfair and undeserved advantages; and others. Such ideologies are principled, and some form an integral part of the American ethos.

c. The Role of Ideology in Constructing Divisions and "We-They" Thinking

As stated above, whether direct democracy is a vehicle for prejudice centers around the very difficult proposition posed by Kinder and Sanders. Does ideology serve to cohere racial resentments, or are they battling over ideas? The data and narratives examined in Part III.B appear to have components of both.

In addition, ideology serves as a vehicle for the formation of group identity. This function explains why all of the direct democracy initiatives discussed in Part III.B evolved into "we-they" group thinking that has pitted majorities against minorities. Also, some of the issues that majority-minority initiatives address, even in absence of racial feelings, construct racial and social hierarchies that exclude "others," those with differing, minority perspectives, from the polity.

i. Ideology and the Formation of "We-They" Thinking

Kathryn Woolard provides an explanation of how ideology becomes the vehicle for coalescing collective action.³³⁵ Direct democracy campaigns are

³³⁴ See Byron M. Roth, *Social Psychology's "Racism,"* in *CONTENDING VIEWS*, *supra* note 229, at 60. Criticizing Kinder and Sanders, Roth observes: "In truth, the hard data that supposedly buttress the analyses of whites' racial attitudes are susceptible to a wide variety of interpretations. By no means do the data justify social scientists in their competing and demeaning explanations of Americans' 'resistance to racial equality.'" *Id.* at 68; *see also* Hochschild, *supra* note 287 (ascribing the racial divide on affirmative action to differing group symbolic ideologies).

³³⁵ See Kathryn A. Woolard, *Sentences in the Language Prison: The Rhetorical*

“grass roots” because they elaborate a theme that strikes a chord in the electorate. The spontaneity of Miami’s anti-gay civil rights and the English-only campaigns demonstrate how saying the right thing at the right time mobilizes a majority. Woolard observes that majorities are not static or given, rather they are changing and dynamic.³³⁶ Thus, campaign themes are the catalysts in building groups³³⁷ out of these disparate interests. These themes create rather than merely reflect conflicts.³³⁸ These themes have appeal because there is some latent anxiety about change and status.³³⁹ Such widely shared concerns “vent” through the campaign rhetoric, and it is this function that recruits a broad spectrum of supporters.

Woolard builds on Joseph Gusfield’s concept of status conflicts.³⁴⁰ Professor Rachel Moran, who applied this idea to describe the majority-minority conflict in the context of bilingual education, describes status conflicts as intergroup clashes in the political or electoral arena over “approval, respect, admiration, or deference.”³⁴¹ In the electoral arena, groups attempt to assert their dominance, or defend if they perceive a threat to their own way of life or cultural ideological viewpoint.³⁴² Because status conflicts are frequently framed in terms of morality or cultural and civic ideology, they are not necessarily conscious or clearly visible. At the same time, the tensions are deeply emotional because the conflict has come to represent deeply held notions of self.

The narratives in Part III.B seem to bear out this hypothesis. Miami’s twin initiatives, anti-gay civil rights and English-only, were spontaneous and grass roots. With an idea, “we want Miami back for us,” two women talking on a radio show struck a chord. In one week, radio talk show banter became an organized funded political initiative. The themes tapped into latent anxieties among the Anglo majority about Cuban Americans’ increased numbers, higher status, and

Structuring of an American Language Policy Debate, 16 AM. ETHNOLOGIST 268 (1989).

³³⁶ See *id.* at 269.

³³⁷ See *id.*

³³⁸ See *id.*

³³⁹ Woolard adds that these rhetorical themes allow majorities to “assuage doubts [about norms and institutions] by projecting suspected negative aspects of social life onto outsiders.” *Id.*

³⁴⁰ Joseph Gusfield derived this status conflicts framework from his attempts to understand the Temperance movement. See JOSEPH GUSFIELD, *SYMBOLIC CRUSADE* 17–19, 180 (1963).

³⁴¹ Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 341–42 (1987). Professor Balkin, more generally, has applied sociologist Joseph Gusfield’s concept of “status conflicts” to a category of challenges distinct from the anti-discrimination and anti-subordination challenges currently facing the Equal Protection Clause. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321–23, 2373 (1997).

³⁴² See Moran, *supra* note 341, at 341–42.

higher profile.³⁴³ Anita Bryant's anti-gay "blueprint" tells a similar story. She was jolted into action when the Dade County council enacted an anti-discrimination ordinance that included gay men and lesbians. Her appeals found a home among Miami's moral conservatives.³⁴⁴

Woolard's theory can be applied as well to themes that strike a chord of anxiety and cause racial tension to be manufactured, rather than to rise spontaneously. The animosity directed towards illegal immigrants (and foreign-looking citizens) during and after Proposition 187 was latent prior to Proposition 187, but it was mobilized through campaign rhetoric, advertisements, and media images.³⁴⁵ The drafters of Proposition 209 purposefully exploited racial anxiety/resentment by choosing wording for the proposition that was most likely to excite racial tension—"preferences" and "quotas."³⁴⁶ Proponents then built a campaign around these themes.³⁴⁷

ii. *Monistic Ideologies and the Construction of Hierarchy*

As Americans, we have constructed concepts and narratives of who we are, where we come from, and what makes us unique as a people.³⁴⁸ Within that framework, social groups—white Americans, African Americans, Asian Americans, and Latinos—as well as individuals compose narratives as to who they are and how they belong and fit within the polity.³⁴⁹

The central function of political discourse is to deliberate over civic ideology, discussing what are our values and what is our cultural civic identity. This is a legitimate discourse and one that takes a central place in a liberal democratic polity. Although minority group members share many of the core American civic values, they of course do not always share the majority's view on all issues. For example, in the case of English-only, minorities contest the

³⁴³ See *supra* notes 182–85 and accompanying text.

³⁴⁴ See *supra* notes 136–42 and accompanying text.

³⁴⁵ See discussion *supra* Parts III.B.2.d.iii, iv.

³⁴⁶ See *supra* notes 294–96 and accompanying text.

³⁴⁷ See *supra* notes 300–06 and accompanying text.

³⁴⁸ In *Homo[geneous] Americanus*, I describe this concept as follows:

The hold of ethnocentrism is directly related to the important role that culture plays in how societies think about themselves. Cultural character endures over time, forms the psychological and sociological anchor of a society, and becomes the traditions and norms that capture the essence of what a people are and understand themselves to be.

Lazos Vargas, *Homo[geneous] Americanus*, *supra* note 17, at 1511 (citations omitted).

³⁴⁹ See generally HOCHSCHILD, *supra* note 277 (reviewing a comprehensive collection and analysis of attitudinal data by race on the "American Dream").

majority's vision of the civic ideology of Americanization. The majority's vote for English-only reaffirms an ideology of how they view what it means to be an American: assimilation and Anglo-Saxon cultural monism. Cultural minority group members, on the other hand, often contest that ideology and hold a different view of what it means to be an American. Many cultural minorities accept multiculturalism and would allow persons from multiple backgrounds to join together in a polity without giving up their individual cultural differences.

Ideologies construct social and racial hierarchies. A monocultural vision of who is an American can be the means, intentionally or unintentionally, to exclude those who do not fit within this monocultural vision. In a prior work, I argued that the American ideology of assimilation that is embodied in the Euro-white ethnic immigrant narrative is the modern way in which Americans construct race.³⁵⁰ Such narratives or ideologies need not be linked to racial feelings.³⁵¹ When cultural minorities wish to assert rights to retain and continue to express their own distinct culture, majorities' rejection of that statement may not necessarily be expressing prejudice, but a dominant idea of what it means to be an American. However, culture and language are closely linked to how we think of ourselves, how we identify ourselves, and how we position ourselves within the polity. By rejecting multiple ways of being, the dominant majority also forecloses the possibility of a cultural minority's inclusion and co-existence on terms that recognize their full humanity.

d. *Intertwining of Ideology, Status, and Subtle Racism*

Let us now again reconsider Bell's challenge. Multiple hypotheses supported by credible social research support his charge that majorities vote against minorities because of some form of prejudice. However, hypotheses and data also support the conclusions that the process is complex and that it is difficult to ascertain clearly how much "prejudice" (whether conscious or unconscious) and how much principled ideological contestation is involved in anti-minority results. Nonetheless, we can draw from the data some important conclusions demonstrating that the actual phenomenon of majority-minority initiatives is far

³⁵⁰ See Lazos Vargas, *Homo[geneous] Americanus*, *supra* note 17, at 1505–39.

³⁵¹ Jack Citrin concludes, "Without denying the role played by anti-minority sentiments . . . the positive attachment to the symbols of nationhood, whether self-conscious or just reflexive—contributed significantly to the pervasive approval for 'official English.'" Citrin et al., *supra* note 193, at 549. This is Tarver's interpretation as well: "English-language ability is tied to and becomes a symbol for the 'commitment to being American' [quoting U.S. English literature] and is thus portrayed as being intimately connected with both individual identity and national unity. An assimilated English speaker is by definition a patriot and a member of the body politic . . ." Tarver, *supra* note 188, at 234.

more complex than a mere reflection of overt prejudice.

First, majorities will not tolerate extreme expressions against minorities. Any anti-minority initiative or referendum must be phrased within parameters that permit majorities to articulate that the reasons they voted against minority's interests cohere around acceptable ideological frameworks.

Second, the studies show that group thinking is key and is triggered by these direct democracy initiatives and referendums. Group thinking surfaces because of the way politicians and the media have framed issues. Once group thinking is triggered, minorities become vulnerable to majority "backlash." When the majority perceives a direct challenge to the "normal" order of things, to ideas deeply embedded in American civic culture, the reaction is "grass roots" and resolute. Whenever a minority's actions, as for example gaining greater anti-discrimination rights, trigger group thinking, they are vulnerable to a swift, resolute, and unequivocal majority reaction, which has taken the form of initiatives and referendums.³⁵² This may not be a conscious majority reaction, but, even if unconscious, the end result is the same, which is to stave off any minority advances.³⁵³

Third, certain intergroup confrontational contexts invite voters in effect to react emotionally.³⁵⁴ Majority-minority initiatives address cultural-ideological issues that are intimately tied to group identity. Accordingly, these issues evoke strong emotions, both from minorities and majorities. The dominant group's reaction is in part based in what its members believe it means to be a member of the polity. Whenever group identity dynamics are triggered, the results are

³⁵² This is Bruce Cain's general point. See Cain, *supra* note 88, at 23–24.

³⁵³ See Benjamin Radcliff & Martin Saiz, *Race, Turnout, and Public Policy in the American States*, 48 POL. RES. Q. 775 (1995). In what may be one of the most depressing studies of the correlation between minority political participation and political results, these researchers conclude that "[b]lack political participation is unlikely to produce the policy outcomes that blacks collectively tend to favor." *Id.* at 790. Their regression results are consistent with the hypothesis that "heavy black turnout, compared to whites, tends to produce a measurable 'backlash,' such that public policies become more conservative as blacks vote at higher rates." *Id.* at 788–89.

³⁵⁴ Political scientists make this point most powerfully in the context of racial and ethnic group divisions. The classic is V.O. Key's study of Southern whites' voting patterns in the face of civil rights movement and African Americans' attempts to gain the vote and civic equality. See V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949). Radcliff and Saiz's study of voting results in which increased black electoral participation proved to correlate highly with results that disadvantaged them as a group also supports this hypothesis. See Radcliff & Saiz, *supra* note 353. Finally, the major point of Citrin's study is that such group thinking is also aligned with how the majority symbolically identifies "Americanism." In the case of English-only, challenges by ethnic minorities to the primacy of this powerful symbol of national identity are likely to "inevitably arouse hostility among the majority." Citrin et al., *supra* note 193, at 1148–49.

negative for minorities.

Fourth, many initiatives are formulated as abstract propositions which appeal to majority ideologies. Should English be the language of schools and government? Should we do away with preferences? Should gay men and lesbians obtain "special rights"? These are direct appeals to key ideologies that most Americans share. Would majorities continue to vote anti-minority results consistently if they were to recognize that their vote can and is interpreted as a rejection of minority's self and their sense of belonging in the polity? For those like Bell, who believe that the data show that majorities vote on the basis of racial/homophobic/ethnocentrist feelings, the answer would be that anti-minority results would continue. For those who see more mixed and unclear results, there would be hope that such appeals would curb latent racial/homophobic/ethnocentrist resentments.

Finally, "prejudice" can color the electoral contest. For this to occur, a group must be an acceptable target of the majority's ire. Politicians can then build campaigns that encourage these kind of sentiments.

Part V will argue that the judicial approach to majority-minority initiatives should eschew intent analysis because majority-minority dynamics are so complex, intertwined, and nuanced in whatever is identified as hostility towards minorities. Nonetheless, Part V will also argue that, because the empirical data convincingly show that these majority-minority initiatives trigger "we-they" dynamics that fairly consistently result in a reduction in the context of minorities' democratic citizenship in the polity, the Court should not apply the highly deferential rational basis review to these cases.

2. "New" Politics and Anti-Minority Initiatives

Because direct democracy lends itself to alienating politics, Bell is right in pointing out that the "new" politics aggravates existing majority-minority tensions. Majority-minority initiatives are not inherently antithetical to minorities' interests, but they suffer from many of the faults of modern politics. The new emphasis on money and media has created a civic environment in which complex political issues are resolved by packaging and framing the issue.

Campaigns amplify messages that are potentially divisive. Direct democracy states that do not have any substantive screening processes, like California, allow such open access to the ballot that a well-funded, well-managed campaign can almost always succeed in getting its issues to the voters. Mr. Unz's success with Proposition 227 shows that those with an ideological ax to grind, if they have the money and if they have honed in on the right issue, can gain a national forum for their ideas.

Media is all-important. Media can frame issues around ideologies that

provoke latent anti-minority sentiments, or evoke monistic ideologies. Sometimes the approach is not at all subtle, as exemplified by Wilson's ads. Sometimes ads confuse the issues. Proposition 209 campaigns succeeded in misleading some minorities as to the effects of Proposition 209.³⁵⁵

New politics put a premium on drafting propositions in a way that will maximize "gut" reactions and minimize a voter's consideration of the impacts of her vote on minorities. Data on framing and phrasing show that on three divisive issues—affirmative action, English-only, and bilingual education—voters can become more conscious of the impact of their vote on minorities, and when they do, their vote may be altered to favor the position of minorities.³⁵⁶

3. *Effects of Anti-Minority Initiatives*

Majority-minority initiatives are more than "just politics" because they can substantially change the legal and civic terrain, fashion wholesale changes in the state's constitutions, and reconfigure minorities' civic standing within the polity.

a. *Minorities Lose Consistently*

The data regarding direct democracy initiatives set out in Part III.A shows an empirical result that has been consistent over three decades and over a range of civil rights issues. Minorities lose fairly consistently whenever majorities use this lawmaking vehicle to resolve controversial issues in which minorities have a large stake.³⁵⁷

b. *Citizenship Impacts*

Direct democracy is not problematic merely because mathematics dictates that minorities will lose on many issues, including those issues about which they care the most. Rather, in all the cases that we have reviewed, issues that trigger majority group thinking are issues directly related to a minority group's status in the polity. Thus, majorities vote on the content of minorities' democratic citizenship standing. Does citizenship entail for minorities, as well as majorities, the privilege and benefit not to be discriminated against in housing, employment, and public restaurants? Should unpopular minorities, such as illegal immigrants, be denied access to benefits of government and education, which other citizens enjoy? Should language minorities accept that American citizenship means that *all* public discourse must be conducted only in English, the language of the

³⁵⁵ See *supra* notes 300–06 and accompanying text.

³⁵⁶ See *supra* notes 219–21 and accompanying text.

³⁵⁷ See *infra* Appendix A.

dominant majority, to the exclusion of their own language? Should equal opportunity mean that governments cannot take into account minorities' pre-existing and existing unequal status? Majority-minority initiatives, as we currently know them, constantly put to a test what are to be those minimum rights of co-participants that we believe that all citizens should enjoy, both majorities and minorities. For these reasons, Part V below will argue that this should be a core part of the Court's judicial review.

c. Alienation

Something happens to the fabric of the polity, the civic relationship between majorities and minorities, when anti-minority initiatives succeed. Business does not go on as usual. These initiatives are structured as yes/no propositions that in the voting booth become referendums on minority's membership in the polity.³⁵⁸ In Miami, in the aftermath of English-only, Cuban Americans felt rejected from civic life because in fact they had been rejected. In Colorado, after Amendment 2, gay men and lesbians called for a national boycott of their state. In California, in the aftermath of Proposition 187, Mexican Americans, in particular, have been further racialized by the heightened hostility to "foreigners" and those who look and act foreign.³⁵⁹ In the proposed test articulated in Part V, I will argue that it is appropriate for the Court to consider these alienation and stigmatization effects.

There is irony in these results. A case can be made that even when majorities vote for anti-minority initiatives or referendums, it is not the majorities' intention to alienate or reject minorities, or even to undercut their rights and status. However, the effect of these votes, particularly when it affects a state constitutional amendment, is irrevocable.

In addition, successful initiatives spur congressional and other representative bodies to action. This is precisely what direct democracy is designed to do—break through the logjams of representative processes to initiate action in areas that representatives are loath to address. However, majority-minority initiatives highlight the electoral weakness of minorities. Politicians, in whatever forum they may be, take advantage of those they believe to be weak and can be exploited by populist politics. For example, a spin-off of the Dade County anti-gay civil rights campaign was that the Florida state legislature enacted legislation barring gay men and lesbians from adopting children.³⁶⁰ With respect to immigration, congressional actions following the enactment of Proposition 187 initially targeted both illegal and legal immigrants, again showing spillover of

³⁵⁸ See generally Clark, *supra* note 27.

³⁵⁹ See *supra* note 256 and accompanying text.

³⁶⁰ See FLA. STAT. ANN. § 63.042(3) (West 1997).

anti-illegal immigrant animosity to other groups that in the majority's imagination are "foreignized" as well.³⁶¹ Likewise, the success of Proposition 227 triggered reconsideration of federal funding of bilingual education and makes it more likely that support for bilingual education both in the U.S. Congress and in other states with high numbers of Latinos will be cut back.³⁶²

In sum, regardless of the motivations that inspire majority-minority initiatives, it appears that these have a very powerful impact on both majorities and minorities, as well as the civic life of the polity. As Dworkin admonishes,³⁶³ it reflects badly on a polity when its politics target its weakest members: the racialized, the unpopular, the different. The issue is not that there are majority-minority conflicts, but how they get resolved in this particular democratic forum. The effect is to lengthen the social and civic distance, already significant, between those who somehow must learn to co-exist.

IV. JUDICIAL REVIEW OF DIRECT DEMOCRACY: DOCTRINAL AND THEORETICAL INCOHERENCE

Thankfully, the absence of any specific findings by the district court . . . relieves us from having to reconcile . . . *Hunter*[] Our task in this case is merely to determine whether the district court relied on an erroneous legal premise.³⁶⁴

Majority-minority direct democracy cases became part of the Supreme Court's equal protection portfolio as the political struggle for civil rights spilled over into popular democracy forums. Anti-integration initiatives and referendums described in Part III.B.1 formed the first group of cases that the Court had to resolve. Within the last four terms, the Court has had on its docket two cases, *Romer v. Evans*³⁶⁵ and *Yñiguez v. Arizonans for Official English*,³⁶⁶ that brought before the Court the constitutionality of ideological initiatives and referendums described in Part III.B.2.

³⁶¹ See, e.g., Pub. L. No. 104-193, 110 Stat. 210S, 2260-77 (1996) (as amended at Pub. L. No. 105-33, 111 Stat. 251, 597 (1997)) (restricting aliens' access to welfare and other public benefits).

³⁶² See, e.g., The English Language Fluency Act, H.R. 3892, 105th Cong. (1998); see also 144 CONG. REC. H7521-52 (daily ed. Sept. 10, 1998) (consideration of H.R. 3892, the English Language Fluency Act); *id.* at H7527 (discussion by Rep. Torres regarding Proposition 227 and anti-immigrant sentiments).

³⁶³ See *supra* note 1 and accompanying text.

³⁶⁴ *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 705 (9th Cir. 1997) (citations omitted).

³⁶⁵ 517 U.S. 620 (1996).

³⁶⁶ 117 S. Ct. 1055 (1997) (vacated as moot).

A. *The Supreme Court's Failure to Come to Terms with Judicial Review of Direct Democracy*

How has the Supreme Court reacted to these complex cases? Not well. First, the Supreme Court has failed to see these cases as a *sui generis* equal protection problem that demands a strong, clear, and coherent doctrine founded in equal protection principles. Second, the Supreme Court has failed to articulate a consistent or coherent approach. Of the seven primary Supreme Court decisions that address these issues, four—*Reitman v. Mulkey*,³⁶⁷ *Hunter v. Erickson*,³⁶⁸ *Washington v. Seattle School District No. 1*,³⁶⁹ and *Romer v. Evans*³⁷⁰—invalidate the legislative and constitutional outcome. In doing so, the Court's opinions acknowledge that the initiatives or referendums being challenged are a product of majority-minority conflict in which majority group hostility has played a role. Three other prominent initiative cases—*James v. Valtierra*,³⁷¹ *City of Eastlake v. Forest City Enterprises*,³⁷² and *Crawford v. Los Angeles Board of Education*³⁷³—did not invalidate the initiatives. In these cases, popular sovereignty lawmaking is lauded as an expression of the people to which courts must defer. The Court does not acknowledge, explicitly or implicitly, that these cases involve a majority-minority conflict, or that the results of these initiatives and referendums will negatively impact on *some* minority's citizenship rights and status. Finally, *Romer v. Evans*,³⁷⁴ the most recent Supreme Court pronouncement, does not cite any of these predecessor cases and does not set out a clear standard for judicial review. Not surprisingly, lower federal and state courts have also struggled, without success, to come to terms with direct

³⁶⁷ 387 U.S. 369 (1967) (striking down California constitutional amendment proscribing fair housing legislation).

³⁶⁸ 393 U.S. 385 (1969) (invalidating City of Akron automatic referendum requirements applicable only to fair housing ordinances).

³⁶⁹ 458 U.S. 457 (1982) (striking down initiative that would have restricted busing).

³⁷⁰ 517 U.S. 620 (1996) (striking down initiative that would have precluded legislative bodies from enacting legislation designed to protect gay men and lesbians against discrimination).

³⁷¹ 402 U.S. 137 (1971) (upholding ordinance that required referendum for any change in zoning that would allow low income housing).

³⁷² 426 U.S. 668 (1976) (upholding super-majority automatic referendum requirement applicable to any change in the land use code).

³⁷³ 458 U.S. 527 (1982) (upholding California constitutional amendment limiting state court-ordered busing to situations in which federal court had found remedy necessary under the Fourteenth Amendment).

³⁷⁴ 517 U.S. 620 (1996).

democracy in the majority-minority context.³⁷⁵

The direct democracy cases are very difficult for courts because they require judges to address majority-minority conflicts in highly politicized contexts and therefore have great potential to undermine the interconnectedness of the polity. These cases also highlight what some might view as an extreme act of judicial hubris, in that judicial review allows one lone judge to assert that her judgement is superior to that of millions of voters.³⁷⁶ Unfortunately, courts have not come to terms with how to defer to popular sovereignty while still safeguarding minority's basic minimum rights and status. In an attempt to protect the minority from the majority, while still respecting popular sovereignty, courts have created a variety of unworkable doctrinal devices.

The Parts that follow will examine courts' various failed attempts to reconcile these concerns. In an effort to systematically examine the incoherence of these attempts, this Article will divide the judicial approaches into six categories.³⁷⁷ These categories are not intended to be exclusive, but rather to focus on some of the key differences among the cases.³⁷⁸ This Part will show that these attempts have largely been both inconsistent and conclusory. Cases that appear virtually identical are treated quite differently, and the placement of a case in one category rather than another proves critically important in terms of whether the initiative is allowed to stand. That is, courts have proved infinitely able to manipulate the concepts and categories to exercise what appears to be boundless discretion in reviewing democratic initiatives. Furthermore, the courts never make precisely clear just what a plaintiff must show in order to defeat an

³⁷⁵ Some of these recent decisions have struck down the democratic initiatives. *See, e.g.*, *Ruiz v. Hull*, 957 P.2d 984, 1002 (Ariz. 1998) (invalidating Arizona English-only measure); *Romer v. Evans*, 854 P.2d 1270, 1278–82 (Colo. 1993) (striking initiative preventing gay men and lesbians from securing protective legislation). Others have allowed them to stand. *See, e.g.*, *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997) (concluding, notwithstanding *Romer*, that anti-gay referendum was constitutional); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997) (reversing district court's decision enjoining enactment of Proposition 209, the California Civil Rights initiative).

³⁷⁶ The anti-majoritarian hubris, and courts' at times schizophrenic reaction to it, are highlighted by the recent public discourse in *Coalition for Economic Equity v. Wilson*. 122 F.3d at 692. *See supra* notes 15–16 and accompanying text.

³⁷⁷ Because all of the Court's decisions are subject to multiple interpretations, they will be discussed in several different categories.

³⁷⁸ Professor Seeley's early analysis of this doctrinal area formulated five categories. *See* James J. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881, 896–97 n.66 (1969–1970) (providing chart to try to “keep track” of the Court's multiple theories and approaches). Since Professor Seeley's very helpful analysis, courts have expanded rather than shrunk their alternative approaches.

initiative under any of the analyses. In sum, this area of equal protection is a mess.

B. *The View That Judicial Review of Direct Democracy Violates the "People's Will"*

Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.

Justice Black³⁷⁹

Under one interpretation of the key cases, judicial review of direct democracy violates democratic principles. Although the Supreme Court, in *Marbury v. Madison*,³⁸⁰ articulated that courts are required to strike down legislation that is unconstitutional, the Court's rhetoric would seem to imply that direct action by the populace should never be thwarted.³⁸¹ Pursuant to this view, "we the people" should have ultimate control over our polity.³⁸² Two of the Supreme Court's direct democracy decisions, *Valtierra* and *City of Eastlake*, are filled with similar rhetoric, such as the quote from Justice Black that begins this section.³⁸³ These decisions, refusing to strike citizen initiatives that restructured

³⁷⁹ James v. Valtierra, 402 U.S. 137, 141 (1971) (Black, J.).

³⁸⁰ 5 U.S. 137 (1803). See generally GUNTHER & SULLIVAN, *supra* note 31, at 3 (emphasizing that understanding how *Marbury* affects this issue is "essential to thinking about Court power today"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 23-66 (2d ed. 1988) (discussing multiple approaches to judicial review); see also FARBER ET AL., *supra* note 30, at 63-76 (focusing the function of constitutional adjudication on both *Marbury* and *Brown*).

³⁸¹ But see Hunter v. Erickson, 393 U.S. 385 (1969). The Court stated that referendums and initiatives are like results of other lawmaking bodies, and, as such, are subject to the Court's judicial review: "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Id.* at 392.

³⁸² Although Professor Bruce Ackerman has emphasized this phrase, he does not go so far as to argue that all judicial review of direct democracy is inappropriate. Rather, Ackerman contends that the United States' constitutional scheme is a deliberative one in which ultimate authority resides with "we the people," and the Court, which should reflect this popular will, is engaged in the process of formulating constitutional law principles. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). Ackerman is concerned that "we the people" express our values in what are rational and deliberative ways. See *id.*; see also RAWLS, *supra* note 28, at 232 ("Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people."); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 53-54 (1996) (arguing legitimacy resides in achieving the polity's assent to controversial judicial decisions).

³⁸³ See *infra* Part IV.C.3. *Valtierra's* and *City of Eastlake's* distinctions of *Hunter* are unsatisfactory. In *Valtierra*, Justice Black punctuates an unconvincing exercise in public

local land use decisions, seemingly endorsed popular sovereignty as fundamental to democratic governance—without qualification.³⁸⁴ The Ninth Circuit's *Coalition for Economic Equity* seemingly endorsed such a view when, in reversing the district court's issuance of an injunction opposing an anti-affirmative action referendum, it stated: "[J]udges apply the law; they do not sua sponte thwart wills If . . . the court relies on an erroneous legal premise, the decision operates to thwart the will of the people. . . . [W]hat the people . . . willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established."³⁸⁵ Similarly the Sixth Circuit's *Equality Foundation of Greater Cincinnati* cited to direct democracy rhetoric when, after an unconvincing effort to distinguish *Romer v. Evans*, it held that the Cincinnati anti-gay civil rights referendum did not violate the Equal Protection Clause.³⁸⁶

Although the Court does not make the point, both *Valtierra* and *City of Eastlake* involved majority-minority conflict. Specifically, they involved citizen initiatives that restructured local land use decisionmaking to require an automatic citizen referendum whenever land use decisions were likely to affect the community's homogeneous makeup. In *Valtierra*, California voters by initiative amended the state constitution to require that all low-rent housing projects could be sited in a community only after the voters in that locality had approved it by referendum.³⁸⁷ The constitutional initiative was a reaction to local officials'

reasoning with the passage quoted in the text accompanying note 373 *supra*. In *City of Eastlake*, to ratchet up equally weak thinking, Justice Burger cites to Justice Black's eulogy of direct democracy already cited. See *City of Eastlake*, 426 U.S. at 678 ("This procedure ensures that *all the people* of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services" (quoting *Valtierra*, 402 U.S. at 143)).

³⁸⁴ Early commentary on these cases makes this point. See Bell, *supra* note 82, at 4; Gunn, *supra* note 88, at 147–53.

³⁸⁵ See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997). It further stated: "To hold that women [for example] . . . would [be] subject to 'political structure' scrutiny [which *Hunter* might require] . . . is inimical to a constitutional scheme founded on democratic self-government." *Id.* at 705 n.13.

³⁸⁶ See *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 297–98 (6th Cir. 1997).

³⁸⁷ The California constitutional amendment provided:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

attempts to build low-income housing with federal funds.³⁸⁸ In *City of Eastlake*, the voters of a suburban community by initiative amended their charter to provide that changes to the land use code would only be effective if approved with a super-majority vote, 55%, in a referendum.³⁸⁹ The initiative was a direct reaction to a developer attempting to site multi-family units within the community.³⁹⁰ Thus, both initiatives would have a racial impact by enabling white majorities to limit the encroachments of racial and poor minorities into their homogeneous communities. Moreover, the *Valtierra* and *City of Eastlake* facts reflect majority backlash to perceived encroachments by an outside group and a political context in which “we-they” thinking had invaded the political process.

The Court’s approach to judicial review in *Valtierra* and *City of Eastlake* is problematic for several reasons. First, it simply proves too much. The decisions offer courts no way to distinguish between those cases in which no judicial review is appropriate and those in which review is required. Yet, at least since *Marbury*, it has been clear that the courts are supposed to play some role in protecting against unconstitutional actions. Second, as will be seen, it is not at all clear how the facts at issue in these two cases can reasonably be distinguished from those at issue in cases such as *Hunter* and *Reitman*, in which the Court found initiatives directed at housing discrimination to be unconstitutional.³⁹¹

James v. Valtierra, 402 U.S. 137, 139 n.2 (1971).

³⁸⁸ See *id.* at 139 (explaining that suits were brought by citizens of San Jose and San Mateo County, California where housing authorities were unable to site low-income projects because of local citizen referendums).

³⁸⁹ See *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 670 (1975).

³⁹⁰ The Supreme Court of Ohio describes the timing of the initiative and the appellant’s land use permit application for rezoning of the multi-family project as follows:

On May 18, 1971, appellant made application to the Planning Commission for rezoning. While appellant’s application was pending, initiative petitions were circulated, and a proposal requiring voter approval of all land use changes placed on the ballot. On November 2, 1971, Section 3, Article VIII of the Eastlake charter was adopted.

Forest City Enter., Inc. v. City of Eastlake, 324 N.E.2d 740, 742 n.1 (Ohio 1975).

³⁹¹ These cases have historically been problematic for analysts. See Bell, *supra* note 82, at 4 (stating that “judicial obsequiousness in housing referendum cases where the result does not overtly and invidiously burden racial minorities is not justified”); Gunn, *supra* note 88, at 147–53 (concluding that both *Valtierra* and *City of Eastlake* radically contract racial minority’s substantive due process and equal protection rights); Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–1978) (reconciling these cases by explaining that the Court uses two distinct models of legitimacy—economic and public choice); Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91

C. Multiple Justifications for Judicial Review of Direct Democracy

The counter to this position is that courts have a legitimate role in exercising judicial review over initiatives and referendums. This Part will discuss six distinct approaches.

1. Ensuring a Neutral Process

John Ely's³⁹² theory of judicial review focuses on judges respecting the views of democratic processes. "Process" theory emphasizes that courts *reinforce* democratic processes by ensuring that deliberation is free of prejudice and is deliberative.³⁹³

Hunter and *Seattle School District No. 1* endorse a "neutral process" approach. Justice Harlan, concurring in *Hunter*,³⁹⁴ states that the problem with the anti-fair housing ordinance at issue in that case is not that it defeats "Negro political interests,"³⁹⁵ but rather that it singles out for referendum one particular category of disputes. The Akron automatic majority referendum requirement at

HARV. L. REV. 1373, 1375-76 (1978) ("*Eastlake* miscasts, and in the process too facetly dismisses as a problem of delegation, the much neglected issue of the constitutional status of legislation by initiative or referendum."); Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637 (1980) (suggesting that direct democracy results, such as those found in *Valtierra* and *City of Eastlake*, could be countered by structural checks); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 S. CT. REV. 127, 150 [hereinafter Sunstein, *Public/Private*] (concluding that *Hunter* is "[a] category of classifications that qualify neither as facially neutral nor as facially discriminatory [but nonetheless] . . . ought not to receive . . . deference").

³⁹² See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). This Article discusses only that aspect of Ely's theory that explains why certain minorities may sometimes be excluded from the political process. The broader version of Ely's process theory is more controversial. He argues that process review provides a more robust justification for constitutional judicial review than alternative substantive views because it is less subjective than substantive traditional justifications, and that process-based rights are the only rights that should be recognized. See *id.* at 87-104.

³⁹³ Professor Ely calls process theory "participation-oriented, representation-reinforcing" because the Court ensures that the democratic process represents all members of the polity, not just the majority. See *id.* at 87.

³⁹⁴ *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

³⁹⁵ Harlan recognizes that racial minorities, like other political groups, must vie in the back and forth of political battle. Not all losses in such battles are unconstitutional. "If the Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection." *Id.* at 394. That is, Harlan distinguishes the Akron ordinance from other kinds of cases in which there is a political conflict and contest that would "operate to disadvantage Negro political interests." *Id.*

issue in *Hunter* applied only to fair housing ordinances, providing that the city council could not, *motu proprio*, enact any fair housing legislation.³⁹⁶ Instead, in such cases a referendum had to be submitted to the voters at a regular or general election and any such ordinance would be effective if approved by a majority of the voters.³⁹⁷ This singling out, suggests Harlan, is not grounded in “neutral” principle,³⁹⁸ and for that reason interferes unconstitutionally with the legitimate lawmaking process.³⁹⁹

What is it about the Akron referendum that is “non-neutral?” Harlan employs deductive legitimate purpose analysis to make this determination. First, he accepts, as does the majority, that “the clear purpose” of the Akron ordinance is to “mak[e] it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.”⁴⁰⁰ He reasons that fair housing ordinances evoke “passionate opposition” and thus would normally fail.⁴⁰¹ Because fair housing ordinances are selected out for automatic referendum treatment, which the majority would routinely vote down, the process is not “neutral,” and, therefore, cannot further any legitimate state interest.⁴⁰²

Seattle School District No. 1,⁴⁰³ decided thirteen years after *Hunter*, also relies, in part, on this “neutral process” conception.⁴⁰⁴ In *Seattle School District*

³⁹⁶ See *id.* at 387.

³⁹⁷ See *id.* at 390. The city charter of Akron had been amended to provide:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.

Id. at 387 (quoting Akron City Charter § 137).

³⁹⁸ See *id.* at 395 (Harlan, J., dissenting) (citing *Reitman v. Mulkey*, 387 U.S. 369, 389 (1967)).

³⁹⁹ See *id.* at 393 (stating that laws must provide a “just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents”).

⁴⁰⁰ *Id.* at 395.

⁴⁰¹ See *id.* at 395–96 (“If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say.”).

⁴⁰² See *id.*

⁴⁰³ 458 U.S. 457 (1982).

⁴⁰⁴ See *id.* at 469–70. The Court stated: “[W]hen the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice, the governmental action seriously ‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.’” *Id.* at 486 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

No. 1, the Court explains that there is a constitutional violation if an initiative or referendum "allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process."⁴⁰⁵ The Seattle initiative prevented local school boards from implementing any geographical busing, except in cases where a court of competent jurisdiction had adjudicated a busing remedy.⁴⁰⁶ Justice Blackmun, writing for the majority of the Court, adopts the lower court's findings to conclude that this initiative "beyond reasonable dispute . . . was enacted 'because of . . . adverse effects upon busing for integration.'"⁴⁰⁷ The Court found that subjecting desegregative student assignments to "unique treatment" radically restructures the political process.⁴⁰⁸ It stated that "our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority."⁴⁰⁹ Accordingly, the Court concluded that the Seattle initiative was non-neutral because the Washington initiative "'place[d] burdens on the implementation of educational policies designed to deal with race on the local level.'"⁴¹⁰

While superficially appealing, the neutral process approach is fundamentally flawed. As the critics of process theory have explained in other contexts, searching for "neutral" democratic process sets up its own set of quandaries. Professors Ackerman, Brilmayer, and Tribe describe at least three fundamental problems with neutral process analysis.⁴¹¹ Their critique applies equally to Harlan's neutral decisionmaking process criterion.

First, process scrutiny must employ substantive values to determine whether an outcome is neutral.⁴¹² Process defects or non-neutral results are ubiquitous,

⁴⁰⁵ *Id.* at 470. The Court explained that "it is enough that minorities may consider busing for integration to be 'legislation that is in their interest.'" *Id.* at 474 (quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)).

⁴⁰⁶ *See id.* at 462 (citing Initiative 350).

⁴⁰⁷ *Id.* at 471 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

⁴⁰⁸ *See id.* at 466.

⁴⁰⁹ *Id.* at 472.

⁴¹⁰ *Id.* at 469 (quoting *Lee v. Nyquist*, 318 F. Supp. 710, 719 (W.D.N.Y. 1970)).

⁴¹¹ *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (explaining the "Free-Rider" problem associated with analysis); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291, 1307-08 (1986) (explaining that discriminatory rules, like neutral rules, can be the product of an acceptable process); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072-77 (1980) (suggesting ambiguity in the definition of minority).

⁴¹² *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (explaining the "Free-Rider" problem associated with analysis); Brilmayer, *supra* note 411, at 1308 (indicating that process theory "disguise[s] a dislike for discriminatory rules by

and any competent litigator can construct an argument that certain outcomes are non-neutral. Any majority-minority initiative has the potential to be viewed as having non-neutral process results. Because majorities are in a position of dominance, they will not only always triumph; they will be in a position to restructure the process to ensure that their win is a permanent one. How are we to distinguish the inevitable passion of politics from the unconstitutional majoritarian tyranny of a minority? Whenever a court makes a determination that the result of an initiative is not neutral, it is because the initiative result favors an outcome that, because of the court's pre-existing value choices, the court deems to be "racial" or "motivated by animus."⁴¹³

Second, a process may be "neutral" and still result in outcomes that are substantively undesirable.⁴¹⁴ Participation in a "neutral" democratic process does not guarantee to judges, or minorities, that "strong passions" did not continue to influence the substance of a rule. If the court limits its scrutiny to instances where minorities can show that their future opportunities to modify an outcome are non-neutral, the initial wrong remains unaddressed.

Third, process analysis in the context of direct democracy must be inferential, requiring courts to make judgments of causality: did prejudice or improper racial impact influence an outcome?⁴¹⁵ Legitimate purpose analysis leaves a great deal to a judge's discretion. According to critical legal theorists, the most significant epistemological divide between majorities and minorities are judgments as to what constitutes sufficient causality of discriminatory intent and impact.⁴¹⁶ Judges reflect their social position and social knowledge when they

asserting, without proof, that such rules result from defective processes"); Tribe, *supra* note 411, at 1076 (arguing that process arguments ultimately rest on substantive notions of proper conduct; which rest, in turn, on a theory of enumerated rights, at best, suggested by constitutional text).

⁴¹³ This is the key question posed by critics of process theory. See Brilmayer, *supra* note 411, at 1307 (stating that democratic processes do not fail when majorities win; rather in terms of democratic values "the democratic process work[s]"); Tribe, *supra* note 411, at 1073 ("[H]ow are we supposed to distinguish such 'prejudice' from principled, if 'wrong,' disapproval?").

⁴¹⁴ See Brilmayer, *supra* note 411, at 1308 (arguing that if there is a history of racial discrimination, then neutral rules should be scrutinized contrary to the inference of *Carolene*); see also *id.* at 1309 ("If the interests of blacks are effectively ignored, either before they were granted access to the process or afterward, then their concerns were equally ignored when neutral laws were passed.").

⁴¹⁵ Cf. Tribe, *supra* note 411, at 1075 ("Views about the 'differentness' of groups generally, therefore, may reflect an interacting set of judgments about activities or opinions or roles, expressed . . . dialectically by both 'we' and 'they.' If so, the conclusion that a legislative classification reveals prejudicial stereotypes must, at bottom, spring from a *disagreement with the judgments that lie behind the stereotype . . .*").

⁴¹⁶ See Alan David Freeman, *Legitimizing Racial Discrimination Through*

make this determination. However, purpose review can easily mask a judge inserting unexplained social judgments about discriminatory causality.

These limitations of the neutral process approach are illustrated by comparing the Court's decision in *Washington v. Seattle School District No. 1* to its subsequent decision in *Crawford v. Board of Education*,⁴¹⁷ upholding California's anti-busing measure as constitutional. The California state constitutional initiative at issue in *Crawford* limited state court-ordered busing "to remedy a specific violation . . . of the Equal Protection Clause . . . permitted under federal decisional law."⁴¹⁸ Under the California initiative, neither state school officials nor state courts could utilize busing as a means of reaching racial integration, unless they could meet federal court standards for imposing a racial integration remedy under *Brown* and its progeny.⁴¹⁹ In attempting to distinguish *Seattle School District No. 1*, Justice Powell, writing for the majority, first relies on the lower court's findings to conclude that the California initiative has no racial impact.⁴²⁰ Because the proposition received overwhelming support from members of all races and, on its face, the initiative did not state a discriminatory objective, the Court explains that it need not question the lower court's findings.⁴²¹ Second, because there are supposedly no significant racial impacts, the Court does not find a political process distortion, as existed in *Hunter*.⁴²² The segregation remedy has not been singled out in the political process for "peculiar and disadvantageous" treatment.⁴²³ Moreover, the Court finds that minorities and minority parents still have recourse in federal courts if they could prove, as

Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1052-57 (1978) (explaining that discrimination can be "approached from the perspective of either its victim or its perpetrator"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 348-49 (1987) (describing several "scenarios that demonstrate the possible process-distorting effects of unconscious racism on governmental decision"); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199-1211 (1995) (analyzing the information processing system to suggest that stereotypes resulting in discrimination arise from unintentional categorization that is part of cognitive functioning).

⁴¹⁷ 458 U.S. 527 (1982).

⁴¹⁸ *Id.* at 532 n.6 (quoting Proposition I).

⁴¹⁹ See *id.* at 535-36.

⁴²⁰ See *id.* at 545.

⁴²¹ See *id.*

⁴²² See *id.* at 539-41.

⁴²³ See *id.* at 547 (Blackmun, J., concurring) (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 458 (1982)). But see *id.* at 548 (Marshall, J., dissenting) (arguing contrary).

required by federal constitutional law, intentional segregation.⁴²⁴ Finally, the opinion implies that there can be no racial impact because integration of schools has benefits to both majorities and minorities.⁴²⁵

It is difficult to reconcile these opinions.⁴²⁶ The clearest inference is that this was a sharply divided Court. However, more to the point, these cases demonstrate that determinations of neutrality are circular. Whether a challenged initiative has a “racial impact” is the single substantive factual determination that determines the outcome in these cases. The Court may claim that it is making “neutral” process inferential determinations, but these determinations start from the initial judgment of whether the impact on the process is “racial” in nature. If the initiative has no racial impact, its effect on the decisionmaking process is “neutral”; on the other hand, the decisionmaking process is not neutral when there is racial impact.

In short, circular reasoning does not offer any principled guidance as to how to solve the direct democracy conundrum. Justice Harlan’s neutral process solution does not solve the problem because the Court fails to identify what makes some initiatives “racial.”

2. *Prohibiting Discriminatory Intent*

*Washington v. Davis*⁴²⁷ and its progeny require that challengers to legislative enactments under the Equal Protection Clause must demonstrate discriminatory intent. Although the Court has never expressly adopted a standard of review for democratic initiatives that focuses on a search for illegal discriminatory intent, language in several of its decisions might be read to support such an analysis. For example, in *Ruiz v. Hull*⁴²⁸ the sponsors of the Arizona English-only

⁴²⁴ See *id.* at 541–42, 544.

⁴²⁵ See *id.* at 544 (“The benefits of neighborhood schooling are racially neutral.”); see also *id.* at 542 n.27 (taking issue with petitioners’ contention that the initiative was not neutral). But see *id.* at 552 (Marshall, J., dissenting) (placing *Crawford* in the context of California direct democracy actions resisting mandatory integration of housing and public schools).

⁴²⁶ These cases have been much criticized. See sources cited *supra* note 391.

⁴²⁷ 426 U.S. 229, 246 (1976) (finding no discriminatory intent when an employment screening test impacted disproportionately on African-American applicants); see also *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (finding no discrimination in prosecutors’ seeking death penalty in 70% of the cases involving black defendants as compared to 32% of cases involving white defendants); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268–70 (1977) (finding no discriminatory intent in land use decisions that systematically excluded African Americans from a white suburban community); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 213 (1973) (requiring segregative intent in spite of widespread pattern of segregation affecting both Mexican Americans and African Americans).

⁴²⁸ 957 P.2d 984, 989 (Ariz. 1998). The Arizona Court, while rejecting the initiative,

Amendment explicitly argued that the challengers of the initiative needed to show discriminatory intent in order to prevail.

At first glance, the Court's pre-*Washington v. Davis* decisions in *Hunter* and *Reitman* might seem to support this interpretation. In *Hunter*, the Court found the Akron ordinance to be racially discriminatory and unconstitutional under the Equal Protection Clause on two bases: First that the ordinance was racially discriminatory,⁴²⁹ and second that the automatic referendum requirement imposed an unequal structural political process burden on racial minorities.⁴³⁰ In *Reitman*, the Court adopts the lower court's findings of racially discriminatory intent.⁴³¹ However, upon closer analysis it becomes clear that this language merely reflects a legal conclusion arrived at through other analyses. In *Hunter*, the Court holds that there is racial discrimination, but this is after the Court concludes that the initiative has a racial impact.⁴³² In *Reitman*, the Court relies on the California Supreme Court's determination that the "intent" of the constitutional amendment initiative was to authorize and further racial discrimination in the private market.⁴³³ This is an impact. Thus, the finding of "intent" is inferential and hinges on the Court's conclusion that the initiatives have a prohibited impact on a protected racial class.

Washington v. Seattle School District No. 1 and *Crawford*, both decided after *Washington v. Davis*, deal more directly with the discriminatory intent issue. In both *Seattle School District No. 1*⁴³⁴ and *Crawford*,⁴³⁵ the Court

steered clear of an intent analysis, instead stating its confidence in the good faith of the voters of Arizona:

By this opinion, we do not imply that the intent of those urging passage of the Amendment or of those who voted for it stemmed from linguistic chauvinism or from any other repressive or discriminatory intent. Rather we assume, without deciding, that the drafters of the initiative urged passage of the Amendment to further social harmony in our state by having English as a common language among its citizens.

Id. at 991.

⁴²⁹ See *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) ("We hold that § 137 discriminates against minorities . . .").

⁴³⁰ See *infra* Part IV.C.5.a.

⁴³¹ See *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (finding that section 26 was intended to authorize, and does authorize, "racial discrimination in the housing market").

⁴³² See *supra* notes 399–402 and accompanying text.

⁴³³ See *Reitman*, 387 U.S. at 381 ("The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.").

⁴³⁴ 458 U.S. 457, 484–85 (1982).

describes discriminatory intent as an additional ground for establishing that the initiative is unconstitutional. Both cases elect to forego an analysis of whether the motivations of the voters in each initiative were discriminatory. In *Seattle School District No. 1*, the Court cites with approval the District Court's finding that "it was impossible to determine whether the supporters of Initiative 350 'subjectively [had] a racially discriminatory intent or purpose.'"⁴³⁶ Similarly, in *Crawford*, the Court cites with approval the lower court's finding that any "claim of discriminatory intent on the part of millions of voters [is] 'pure speculation.'"⁴³⁷

Romer v. Evans concludes that Amendment 2 is "born of animosity toward the class of persons affected"⁴³⁸ and thus might be cited by some as a case supporting intent review. However, this is not a finding that the people of Colorado are motivated by irrational prejudice, as Justice Scalia's dissent implies.⁴³⁹ Rather, the Court concluded that there were no permissible motivations under constitutional norms.⁴⁴⁰

The purpose of discriminatory intent under *Washington v. Davis* and its progeny is to ground discrimination for which there is a constitutional remedy in only those kinds of discriminatory actions for which causality, culpability, and responsibility can be more firmly established.⁴⁴¹ Applying such an analysis to democratic initiatives is flawed for at least three reasons. First, such an analysis does not address the problems posed by direct democracy. Part III.C concluded that reducing voters' motivations to one single reason, or inferring a one-dimensional attitude from the plethora of mixed and conflicting motives that majority-minority initiatives stir, is a gross oversimplification of social reality and simply subject to measurable contestation. There are no single, simple answers. In addition, as Jane Schacter has argued, constructing the intent of

⁴³⁵ 458 U.S. 527, 537–38 (1982) ("In addition...when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.").

⁴³⁶ 458 U.S. at 465 n.9.

⁴³⁷ 458 U.S. at 543. The Court concludes that there is no factual or legal basis for it to "impugn the motives of the State's electorate." *Id.* at 545. Among the factors that the Court cites are: (1) that the initiative received overwhelming support from the voters, (2) that minorities as well voted for the initiative, and (3) that purpose analysis did not reveal a discriminatory objective. *See id.*

⁴³⁸ 517 U.S. 620, 634 (1996).

⁴³⁹ *See id.* at 645–46 (Scalia, J., dissenting).

⁴⁴⁰ *See infra* notes 528–38 and accompanying text.

⁴⁴¹ *See* Lawrence, *supra* note 416, at 324; Freeman, *supra* note 416, at 1055–60. I do not endorse the propriety of intent analysis as applied to legislative enactments, but only suggest that the application to initiatives is even more questionable.

millions of voters is difficult and indeterminate, and courts are well-advised to shy away from subjective analysis.⁴⁴²

Second, intent analysis would not play an educative function as applied to direct democracy measures. Voters are not actors with executive responsibility, and they do not necessarily vote as if they were. By contrast, school district officials do have executive responsibility, and when they are found to have segregative discriminatory intent, a beneficial purpose may be accomplished.⁴⁴³ Once intent is adjudicated, the decisionmaker has the responsibility to fix the problem, and the adjudication stands on the administrative record as a reminder of errors once committed.

Third, in a constitutional democracy, courts must maintain an appropriate balance between the people, who determine the values of the constitution, and the judicial branch, which interprets these values. Judges maintain their legitimacy as democratic actors through the use of public reason and affirm not only constitutional values, but also democratic values. To require judges to search for discriminatory intent among the majority would necessarily "chill" judges from reviewing actions taken by the voters. The *Ruiz v. Hull* court understood this implicit challenge and expressed its confidence in the good faith of the people of Arizona, while at the same time invalidating the English-only amendment.⁴⁴⁴ This was more than a rhetorical exercise in persuasive flattery. Reason becomes fragile in the heat of majority-minority politics.⁴⁴⁵ Exploding reason as a communicative device by accusing voters of being irrational or prejudiced leaves bare too much and encourages greater contentiousness in an already contentious area.

3. *Proscribing de facto Racial Classifications*

Yet another doctrinal approach is to determine whether the initiative or referendum constitutes a de facto racial classification.⁴⁴⁶ Language in *Hunter*, *Reitman*, and *Seattle School District No. 1* would seem to support such an analysis. *Hunter* found that requiring a majority-approved referendum to enact fair housing ordinances, which on its face did not set forth a racial classification, had a clear racial impact and, under suspect class analysis, could not overcome

⁴⁴² See Schacter, *Direct Democracy and Intent*, *supra* note 30.

⁴⁴³ See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973).

⁴⁴⁴ See *supra* note 428; see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 785 (C.D. Cal. 1995) (finding Proposition 187 preempted by federal law, but acknowledging general frustration of Californians with immigration policy).

⁴⁴⁵ Some would doubt whether reason exists in the electoral context.

⁴⁴⁶ This is how Professor Sunstein reconciled these cases. See Sunstein, *Public/Private*, *supra* note 391, at 150-64.

the compelling state interest scrutiny.⁴⁴⁷ In *Reitman*, the Court upset a constitutional initiative that repealed state-enacted fair housing laws and then protected property rights to “sell, lease or rent . . . to [any] such person or persons as [a property owner], in his absolute discretion, chooses.”⁴⁴⁸ In *Seattle School District No. 1*, the Court found that Initiative 350, which restricted the ability of local school boards to require any student to attend any school other than the neighborhood school, constituted a de facto racial classification.⁴⁴⁹

The key finding in these cases is whether an initiative, which on its face is neutral, can be said to create a de facto racial classification. If the Court so finds, then it need not look for any motivation analysis.⁴⁵⁰ The outcome then is pre-ordained—the Court’s review is “strict” in theory, but fatal in fact.⁴⁵¹

The analyses in these cases of this key factual finding are conclusory. To illustrate this, let us reconsider the issue of how the Court determined that the initiatives at issue in *Hunter* and *Reitman* created de facto racial classifications, whereas those at issue in *City of Eastlake* and *Valtierra* did not. Both sets have racial impact, both involve charged racial politics, and both are part of a dynamic in which one group, the majority, wishes to exclude the “other,” racial minorities and the poor. Both sets are justified by an ideology of property rights. Upon reflection, however, and upon comparing the analyses in *Hunter* and *Reitman* to *City of Eastlake* and *Valtierra*, the reasoning justifying de facto classification analysis is circular and conclusory.

In *Hunter*, the Court stated that a racial classification existed because of the repeal of the fair housing ordinance and because the majority automatic referendum process to enact fair housing legislation “places special burdens on racial minorities.”⁴⁵² However, the analysis is tautological: “[T]he law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.”⁴⁵³ Thus, the Court states that because the Akron ordinance deals with housing discrimination “the reality” is that it is a

⁴⁴⁷ See *Hunter v. Erickson*, 393 U.S. 385, 395 (1986) (Harlan, J., concurring) (stating that the “clear purpose” of the Akron city ordinance is to impact racial minorities).

⁴⁴⁸ *Reitman v. Mulkey*, 387 U.S. 369, 371 (1986) (quoting Proposition 14).

⁴⁴⁹ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1981) (discussing Initiative 350); see also *id.* at 485.

⁴⁵⁰ See *id.* at 485 (“We have not insisted on a particularized inquiry into motivation . . . ‘A racial classification . . . is presumptively invalid . . .’” (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979))).

⁴⁵¹ See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8–10 (1972).

⁴⁵² *Hunter*, 393 U.S. at 391.

⁴⁵³ *Id.*

discriminatory classification.⁴⁵⁴ The same kind of conclusory analysis is at work in *Reitman*. The Court states that California's property rights initiative "was intended to authorize, and does authorize, racial discrimination in the housing market"⁴⁵⁵ without more.

Hunter's weak reasoning on this key finding leaves the back door open for subsequent tautological and circular reasoning going the other way. In *Valtierra*, Justice Black, a vigorous dissenter in both *Hunter*⁴⁵⁶ and *Reitman*,⁴⁵⁷ writes the opinion for the Court. *Valtierra* is not like *Hunter*, he explains, because *Valtierra* is not a racial classification case.⁴⁵⁸ *Hunter* is a racial classification case because the Akron housing ordinance deals with "racial housing matters."⁴⁵⁹ Because *Valtierra* does not, it is therefore neutral.⁴⁶⁰ This is a syllogism and does not explain the Court's conclusion as to why *Hunter*'s initiative is a racial classification and *Valtierra*'s is not. Justice Black ratchets up this weak reasoning by extolling the virtues of direct democracy lawmaking.⁴⁶¹ Yet, *Hunter* was also the result of direct democracy.

Similarly, *City of Eastlake* fails adequately to distinguish *Hunter* and *Reitman*. Instead, in *City of Eastlake*, the Court categorizes a homogeneous suburb's enactment of a mandatory, super-majority, automatic-referendum mechanism for changes in zoning laws that would allow multiple-unit dwellings to be a generic referendum having no racial impact.⁴⁶² The Court does not acknowledge that a super-majority referendum for low-cost housing makes it less likely that such projects will be sited in a homogeneous affluent community. Instead, the Court affirms what we already know: that this initiative is neutral on

⁴⁵⁴ See *id.*

⁴⁵⁵ *Reitman v. Mulkey*, 387 U.S. 369, 381 (1966).

⁴⁵⁶ 393 U.S. at 397 (Black, J., dissenting) ("Here, I think the Court needs to control itself, and not, as it is doing, encroach on a State's powers to repeal its old laws when it decides to do so.").

⁴⁵⁷ 387 U.S. at 395 (Black, J., joining Harlan, J., dissenting) (arguing that *Reitman* is "constitutionally unsound" and overly broad).

⁴⁵⁸ See *James v. Valterra*, 402 U.S. 137, 140-41 (1970) ("The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election.").

⁴⁵⁹ *Id.*

⁴⁶⁰ See *id.* at 141 ("The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.").

⁴⁶¹ See *supra* note 379 and accompanying text.

⁴⁶² See *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 679 (1975).

its face, and delves no further.⁴⁶³ To bolster this weak thinking, Justice Burger cites to Justice Black's eulogy of direct democracy cited above and affirms that the "people of Eastlake" properly have such lawmaking power.⁴⁶⁴

In the end, as Professors Sunstein⁴⁶⁵ and Michelman⁴⁶⁶ explain, the only principled explanation we are left with is that *Hunter* and *Reitman* are sui generis cases because they involve an impact and a right—racial discrimination in housing. Therefore, referendums and initiatives that grant to majority individuals the direct power to deny a minority individual housing for whatever reason, including an arbitrary reason, may be seen as laws that will directly sanction racial discrimination.⁴⁶⁷ On the other hand, racial impacts are less clear and direct in *Valtierra* and *City of Eastlake* because land use decisions can be motivated by both rational economic decisionmaking, such as the desire to protect property values,⁴⁶⁸ and social values, such as the desire to maintain community cohesion.⁴⁶⁹ In these contexts, motivations are plural and mixed, and

⁴⁶³ See *id.* at 677–79.

⁴⁶⁴ See *id.* at 679; see also *supra* note 383.

⁴⁶⁵ See Sunstein, *Public/Private*, *supra* note 391, at 149–50 (calling *Hunter* a quasi-racial classification case).

⁴⁶⁶ See generally Michelman, *supra* note 391 (describing *Hunter* and *Reitman* as following a political social model and *Valtierra* and *City of Eastlake* as implicitly electing an economic model).

⁴⁶⁷ This point is made clearly by *Reitman*, which indirectly validates the *Shelley v. Kraemer*, 334 U.S. 1 (1947), thinking that a state action can "encourage" discrimination. Cf. *Reitman v. Mulkey*, 387 U.S. at 369, 373 n.4 (1967) ("The trial court . . . placed major reliance on *Shelley* . . ."). Relying on *Shelley v. Kraemer*, the California Supreme Court had argued that to let such a constitutional initiative stand would involve the state's sanction of private racial discrimination and would sanction and encourage racial discrimination in housing. See *id.* at 377 ("Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure . . ."); *id.* at 381 ("The right to discriminate is now one of the basic policies of the State. . . . [T]he section [in this case] will significantly encourage and involve the State in private discriminations."). The Court also finds state officials would become participants in "racial discrimination in the housing market," because Proposition 14 would make the proscription of fair housing laws part of the California constitution. See *id.*; see also *id.* at 383 (Douglas, J., concurring) (analyzing Proposition 14 as a "sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under [*Shelley*]").

⁴⁶⁸ An earlier Ninth Circuit case, *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970), involving facts similar to *Valtierra*, draws this distinction clearly. See *id.* at 295.

⁴⁶⁹ Communities are by definition homogeneous, bringing together people of like values, ways of thinking, and life styles. See generally James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1, 21–22 (1990) (arguing that these benefits of community may only be possible in the context of smaller, naturally

racially discriminatory motivations may still exist, but they are less clear. Thus, even though *Valtierra* and *City of Eastlake* both have strong racial impact, they do not reach the level for the Court to find a constitutional wrong.

Although this explanation ties together the loose ends that these cases create, this explanation does not build a coherent doctrine.⁴⁷⁰ Courts must be able to articulate principled reasons as to why in some cases they will honor the political outcome, even when it is exclusionary and has a racial impact, while in others it will veto minority exclusion. Without explanation as to its choice, the Court's opinions lack legitimacy and guidance.

4. Traditional Three-Tiered Review

Under the familiar class-category approach,⁴⁷¹ measures addressed to protected classes merit strict scrutiny, while most categorizations are only subjected to "rational basis" review.⁴⁷² Gender requires intermediate review.⁴⁷³

Where strict scrutiny is applied it is very powerful, dooming most categorizations to which it is applied.⁴⁷⁴ However, only groups that are "discrete

occurring communities).

⁴⁷⁰ Some commentators have found *Valtierra*'s reasoning wrong and unprincipled. See, e.g., Bell, *supra* note 82, at 4 ("[J]udicial obsequiousness is not justified . . . [T]he poor may be permitted a measure of bitter confusion . . .").

⁴⁷¹ The recent gender cases, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), and *United States v. Virginia*, 518 U.S. 515 (1996), and the most recent initiative case, *Romer v. Evans*, 517 U.S. 620 (1996), can be understood as arguing for a new approach that blends the hard edges of tiered review. See Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 76–79 (1996) (suggesting that the Court is moving increasingly towards blended scrutiny). This blending concept was first floated in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). See also Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 241–66 (Stephen Gottlieb ed. 1993) (analyzing tiered review and balancing approaches).

⁴⁷² See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁴⁷³ Gender is the prime example. See *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977). For more recent cases, see *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724 (holding that gender classification cases "must carry the burden of showing an 'exceedingly persuasive justification'" that the classification serves "'important governmental objectives'" (citations omitted)); *United States v. Virginia*, 518 U.S. at 523–24 (applying *Hogan*'s intermediate review standard to place on the state the burden of showing "exceedingly persuasive justification" that gender classifications served a legitimate state purpose).

⁴⁷⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (stating strict scrutiny for racial classifications is not always "fatal," but requiring state action to satisfy the "narrow tailoring" test); *Fullilove v. Klutznick*, 448 U.S. 448, 533–34 (1980) (Stevens, J.,

and insular," that historically have been treated unequally, that have an immutable characteristic, or that are politically powerless merit the Court's strict scrutiny.⁴⁷⁵ Strict scrutiny is to be applied to race,⁴⁷⁶ national origin,⁴⁷⁷ and alienage classifications.⁴⁷⁸ However, the Court has been reluctant to expand these categories.⁴⁷⁹

Although the early initiatives and referendums targeted racial minorities, which is the paradigmatic protected class, the current wave of ideological/cultural initiatives and referendums impact groups that have not typically been found to be protected classes: cultural and language minorities, gay men and lesbians, and illegal immigrants.⁴⁸⁰ The Court has never expressly ruled on the question of whether, because of the tie to racial/ethnic status, language minorities are a suspect class, and it did decline to make such a ruling in *Hernández v. New York*.⁴⁸¹ With respect to homosexuality, the Court,

dissenting) ("[R]acial characteristics so seldom provide a relevant basis . . . and because classifications based on race are potentially so harmful . . . [courts must require] any such classification to be clearly identified and unquestionably legitimate."); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁴⁷⁵ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (setting forth the relevant characteristics of class "suspectness" and rejecting poverty as such classification).

⁴⁷⁶ See *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

⁴⁷⁷ See *Korematsu*, 323 U.S. at 223 (requiring strict scrutiny of national origin classifications, but finding that national security concerns overrode national origin discrimination concerns).

⁴⁷⁸ See *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977).

⁴⁷⁹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (stating that mental disability is not a suspect class); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (finding that illegal aliens are not a suspect class); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (determining that illegitimate status is not a suspect class); *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (finding that gender is not a suspect class); cf. *James v. Valtierra*, 402 U.S. 137, 141 (1970) (stating that low income status is not a suspect class).

⁴⁸⁰ See *supra* Part III.B.2.

⁴⁸¹ 500 U.S. 352, 353 (1991). In *Hernández*, the Court declined to extend *Batson v. Kentucky*, 476 U.S. 79 (1986), to prohibit peremptory challenges of Latinos who spoke and understood Spanish. See *Hernández*, 500 U.S. at 352. The Court acknowledged that Spanish-speaking ability was correlated with belonging to a Latino community. See *id.* at 370. Moreover, the Court found that the *Hernández* holding might decrease the number of Latino jurors. See *id.* at 363. Nonetheless, the Court declined to connect Spanish-speaking ability to ethnicity and, thus, found that the facts and circumstances before it did not warrant a finding that the prosecutor had intended to discriminate on the basis of ethnicity. See *id.* at 371–72. For

similarly, has not explicitly ruled whether gay men and lesbians should be deemed "discrete and insular" and thus merit protected class status. The argument for protected status was put forward in *Bowers v. Hardwick*,⁴⁸² but the Court neither adopted nor rejected it.⁴⁸³ Nor did *Romer v. Evans*,⁴⁸⁴ the most recent Supreme Court case on initiatives, reach this issue. Although the Court's "rational basis" review was more engaged and led it to invalidate Colorado's Amendment 2, this analysis was not triggered by the *status* of gay men and lesbians as a protected class.⁴⁸⁵ Finally, the Court explicitly ruled in *Plyler v. Doe*⁴⁸⁶ that illegal immigrant status did not constitute a suspect class. Thus, if

scholarly critiques of the Court's analysis, see Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents*, 85 CAL. L. REV. 1347 (1997) (arguing that adopting English-only rules in the workplace constitutes a prima facie case of Title VII discrimination on the basis of national origin); Juan F. Perea, *Hernández v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992) (criticizing equal protection doctrine's inability to address language differences); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (arguing that *Hernández* was wrongly decided).

⁴⁸² 478 U.S. 186, 190–94 (1986).

⁴⁸³ Instead, *Hardwick* stands for the proposition that legislation selectively applied to gay men, such as the criminal sodomy statute at issue, merits deferential rational basis review. *See id.* at 196.

⁴⁸⁴ 517 U.S. 620 (1996).

⁴⁸⁵ Rather, as will be discussed, the Court engaged in what it described as rational basis minimal scrutiny review to determine whether the state could establish a legitimate purpose. *See id.* at 631. Although the purpose review was triggered by judicial concern as to why this "unpopular" group had been selected for "unprecedented" disfavored treatment, the Court did not go so far as to find homosexuals to be a suspect class. *See id.* at 631–34; *infra* Part IV.C.6; *infra* Part V.B.1.a. Commentators have provided various explanations as to the standard of review applied in *Romer v. Evans*. *See* Akhil Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 203 (1996) (arguing that the Attainder Clause clarifies and illuminates *Romer* because this clause protects groups from public stigmatization through the use of law); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 329–34 (1997) (arguing that *Romer* is an example of illegitimate purpose scrutiny "[dependent] on the constitutional provision at issue," and that in *Romer* what was illegitimate was that the motivation behind Amendment 2 was to "creat[e] classes among citizens"); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 264 (1996) (explaining that the Court's invocation of minimal scrutiny was an accurate description of the level of review, and that what was unique was that in *Romer* the majority "single[d] out a group for pariah status"); Sunstein, *supra* note 471, at 76–79 (connecting *Romer* with *Cleburne*).

⁴⁸⁶ 457 U.S. 202, 223 (1982). The Court reasoned that because this group had voluntarily acquired such a status, and because it was rational for the government to discriminate against persons who violated U.S. borders, illegal immigrants were not insular and discrete as required to establish protected class status. *See id.* at 223. *Plyler* held, nonetheless, that because a child of an illegal immigrant is not "responsible for his birth and penalizing the . . . child is an

tiered analysis were employed to democratic initiatives and referendums, courts would typically apply the rational basis test, as the Sixth Circuit did in *Equality Foundation of Greater Cincinnati, Inc.*⁴⁸⁷ (anti-gay civil rights), or, at best, intermediate scrutiny review, as the federal district court did in *Coalition for Economic Equity v. Wilson*⁴⁸⁸ (Proposition 209). If rational basis review is applied, the challenged initiative is likely to be upheld.

Even more important, the suspect class analysis is too narrow because it is based on static group concepts.⁴⁸⁹ If the concern is to discourage careless use of stereotypes and state actions that implicitly stigmatize or expressly discriminate, then a characteristic-based class approach of equal protection doctrine is appropriate.⁴⁹⁰ Yet, the majority-minority conflict cases are not about a state actor's legitimization and reinforcement of social discriminatory norms. Rather, majority-minority direct democracy conflicts raise another set of concerns—that the democratic process has gone too far in marginalizing, excluding, or “venting” prejudice against a minority. Protected class analysis is not well suited to addressing this set of concerns.

In addition, the protected class analysis is overly broad when applied to direct democracy measures. The problem of over-inclusion lies in the difficulty of distinguishing those electoral losses for a protected class that should raise a constitutional concern from those losses that are inevitably part of pluralist politics. Under the mathematics of “majority wins” democracy, minorities will be the losing parties in every electoral contest where the initiative is framed so that the interests of minorities and majorities are pitted against each other. In cases where the losing minority is a protected class, if the Court were to apply

ineffectual—as well as unjust—way of deterring the parent,” states may not bar children of illegal immigrants from enrollment in local public schools. *Id.* at 220 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

⁴⁸⁷ 128 F.3d 289 (6th Cir. 1997) (applying deferential review), *cert. denied*, 119 S. Ct. 365 (1998).

⁴⁸⁸ 946 F. Supp. 1480 (N.D. Cal. 1996) (applying intermediate review because affirmative action programs cover gender).

⁴⁸⁹ Professor Bruce Ackerman has argued that anonymous and diffuse groups merit greater scrutiny than “discrete and insular” groups, the test which the Court applies to determine which groups merit protected class review. *See* Ackerman, *supra* note 411. Ackerman argues that anonymous and diffuse groups are less able to be an identifiable and cohesive political cohort that can parlay their minority numbers into meaningful participation in the give and take of plural politics. *See id.* at 722–31. As an example, gay men and lesbians are anonymous in that many would stay “in the closet” as a rational response to dominant societal norms that stigmatize homosexuals and sanction certain types of discrimination. Gay men and lesbians are not insular because they largely co-exist in majority communities, albeit anonymously.

⁴⁹⁰ *See supra* notes 474–79 and accompanying text.

“fatal in fact,” strict scrutiny review, courts could use their judicial authority to enable minorities to win through judicial edicts every result that they had been unable to achieve in the political process.⁴⁹¹

Such a result would be damaging to the democratic process and would also jeopardize the legitimacy of any minority “win.” As the Court stated in the *Civil Rights Cases*, “there must be some stage in the progress of [a former slave’s] elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”⁴⁹² The Court misapprehended the depth and entrenchment of racial ideologies and erroneously construed “mere [private] discriminations” as inconsequential to race relations.⁴⁹³ However, the Court was correct in pronouncing that the legitimacy of the concept of co-equal citizenship requires that the judiciary be able to articulate a clear constitutional principle that justifies judicial intervention on behalf of minorities. The democratic process is structured to respect majorities’ victories, and wholesale invalidation of the democratic process would be an over broad interpretation, as well as an unsustainable result.⁴⁹⁴ In direct democracy politics, minorities should not “win” in courts what electoral politics would dictate that they lose—unless there is a violation of a constitutional principle.

5. *Protecting Fundamental Rights*

Constitutional common law has carved out certain “fundamental rights” based on the Court’s deductive reasoning of what rights are required by the nation’s traditions and the foundational principles of a democratic polity.⁴⁹⁵ Recognized fundamental rights include the right of privacy,⁴⁹⁶ procreation,⁴⁹⁷

⁴⁹¹ For example, if a protected group voted to keep stores open 24 hours a day, and if the majority opposed such a measure, the courts would have to reverse the vote to provide the protected group with what they wanted.

⁴⁹² 109 U.S. 3, 24 (1883).

⁴⁹³ See *id.* at 25.

⁴⁹⁴ See Brilmayer, *supra* note 411, at 1307 (stating that democratic processes do not fail when majorities win; rather, in terms of democratic values, “the democratic process work[s]”); Tribe, *supra* note 411, at 1073 (arguing that process theory must determine “[w]hich are instead to be deemed appropriate losers in the ongoing struggle for political acceptance and ascendancy”).

⁴⁹⁵ See *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (describing fundamental rights as those fundamental liberties that are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if they were sacrificed”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (defining fundamental rights as those liberties “deeply rooted in this Nation’s history and tradition”).

⁴⁹⁶ See *Roe v. Wade*, 410 U.S. 113, 152–56 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965).

and family association.⁴⁹⁸ Where fundamental rights are impinged, courts must conduct a “strict scrutiny” of the measure that is impinging those rights.⁴⁹⁹ The Court generally construes fundamental rights narrowly.⁵⁰⁰

Fundamental rights analysis has been prominent in several of the modern cases dealing with majority-minority initiatives. Specifically, several courts have addressed the question of whether *Hunter* establishes a “fundamental right” to equal political access that requires strict judicial review. Also, the Arizona Supreme Court recently has examined English-only measures using a “fundamental right” to choice of language derived from the First Amendment and the Equal Protection Clause.

a. Fundamental Right to Participate in the Political Process

In *Hunter*, the Court stated that the political process, when modified by a majority-enacted referendum or initiative, cannot place special burdens on minority groups:

Like the law requiring specification of candidates' race on the ballot, [such an impermissible initiative] places special burden on racial minorities This is no more permissible than denying them the vote on an equal basis with others. . . . [A referendum or initiative] may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote⁵⁰¹

The Court echoed this approach in *Washington v. Seattle School District No. 1*, stating that the Equal Protection Clause is violated when “the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for particular and disadvantageous treatment, the governmental action plainly ‘rests on distinctions based on race.’”⁵⁰²

⁴⁹⁷ See *Eisenstadt v. Baird*, 405 U.S. 438, 452–55 (1972).

⁴⁹⁸ See *Moore*, 431 U.S. at 503.

⁴⁹⁹ See *supra* notes 495–98.

⁵⁰⁰ See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights . . .”).

⁵⁰¹ *Hunter v. Erickson*, 393 U.S. 385, 391, 393 (1969) (citing *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

⁵⁰² 458 U.S. 457, 485 (1981) (citations omitted); see also *id.* at 480 n.23 (responding to Justice Powell's dissent, the Court states that the reason the Seattle initiative is found unconstitutional is because of “the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of

Romer I and *Romer II*,⁵⁰³ the Colorado Supreme Court decisions invalidating that state's anti-gay civil rights initiatives⁵⁰⁴ interpreted *Hunter* and *Seattle School District No. 1* to establish a "fundamental right to participate equally in the political process" whenever direct democracy legislation attempts to "fenc[e] out" an identifiable class of persons.⁵⁰⁵ *Romer I* located the right of participation in the *Hunter* Court's citations of vote dilution cases and in Justice Harlan's neutral process principle.⁵⁰⁶ *Romer II*, in addition, articulated that this right is implicit in the right to assemble and petition the government for redress of grievances, a right that the Framers intended would apply to all states under the Privileges and Immunities Clause.⁵⁰⁷ This right to assemble and petition was said to be impinged by Amendment 2 because the terms of the constitutional amendment would effectively deny gay men and lesbians the right to participate in the political process to petition the legislature and local bodies for redress from discrimination.⁵⁰⁸ The Colorado Supreme Court then applied strict scrutiny to Amendment 2 and invalidated it.⁵⁰⁹ The U.S. Supreme Court, without ratifying the Colorado Court's *Romer I* and *II* fundamental rights-compelling

decisionmaking").

⁵⁰³ See *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (en banc) (*Romer II*); *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc) (*Romer I*); see also *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1238-41 (S.D. Ohio 1993) (finding fundamental right in the political process), *rev'd*, 128 F.3d 289 (6th Cir. 1997). See generally Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-only Amendments*, 89 NW. U. L. REV. 690 (1995) (arguing for a right to an undistorted political process).

⁵⁰⁴ Amendment 2 provided as follows:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. II, § 30b, *reprinted in Romer v. Evans*, 517 U.S. 620, 624 (1996).

⁵⁰⁵ See *Romer I*, 854 P.2d at 1282.

⁵⁰⁶ See *id.* at 1278-82; Garfield, *supra* note 503, at 723 (concluding from analysis of *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Davis v. Bandemer*, 478 U.S. 109 (1986), that "the Equal Protection Clause promotes an equal political process and equal citizenship").

⁵⁰⁷ See *Romer II*, 882 P.2d at 1354.

⁵⁰⁸ See *id.*; see also *Romer I*, 854 P.2d at 1279-80.

⁵⁰⁹ See *Romer I*, 854 P.2d at 1282-84.

interest analysis, incorporated into its decision the idea that majorities may not restructure democratic processes to disadvantage an unpopular group.⁵¹⁰

b. *Fundamental Right to Choice of Language*

The Arizona Supreme Court and the Ninth Circuit (in a decision rendered moot by the U.S. Supreme Court) have each used fundamental rights analysis to invalidate the same Arizona English-only constitutional initiative. Both courts drew from the First Amendment and the Equal Protection Clause to establish a fundamental right to choice of language in communicating with government. The Ninth Circuit's *Yñiguez v. Arizonans for Official English*⁵¹¹ interpreted Arizona's English-only amendment to proscribe communications between public employees in languages other than English, even with non-English and non-proficient English speakers, as well as to limit the manner in which elected officials could communicate with their constituents.⁵¹² It found that, although states have a legitimate purpose in promoting civic cohesiveness through the use of English, the First Amendment restricts how far a state can go, and held that the benefits claimed did not outweigh the burdens imposed on the First Amendment.⁵¹³ The Ninth Circuit also found a "close and meaningful proxy,"

⁵¹⁰ See *infra* Part V.B. The Supreme Court found that the Amendment 2 legislation imparted to gay men and lesbians a class status that is disadvantageous because Amendment 2 changes the content of gay men's and lesbians' "ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If Amendment 2 stands, to obtain anti-discrimination legislation, they would have to "enlist[] the citizenry of Colorado" to enjoy what others can take for granted, anti-discrimination safeguards, because it would require a state-wide constitutional amendment. See *id.* at 630.

⁵¹¹ 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated on remand*, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). The Supreme Court determined that Yñiguez could not satisfy the case in controversy requirement because she had resigned during the course of the litigation. Therefore, the case had become moot. See *id.* at 1058.

⁵¹² See *Yñiguez*, 69 F.3d at 932 (interpreting the language of the Amendment that made its mandate applicable to "'the legislative, executive, and judicial branches' of both state and local government, and to 'all government officials and employees during the performance of government business.' §§ 1(3)(a)(i), (ii), & (iv).").

⁵¹³ See *id.* at 944-47. In reaching this conclusion, the Ninth Circuit relied extensively on two cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Farrington v. Tokushige*, 273 U.S. 284 (1927). *Meyer* is a case that some would interpret broadly to protect language rights, because it contains language regarding the fundamental language differences and the importance of diversity. See, e.g., BILL PIATT, *ONLY ENGLISH?* 37-42 (1990). Mr. Meyer, a German language parochial school teacher in Nebraska, was convicted under a 1919 statute that prohibited the teaching of any curriculum in any language other than English to children beyond the eighth grade. See *Meyer*, 262 U.S. at 396-98. The Court held that the statute violated individual due process rights under the Fourteenth Amendment. It stated that "[t]he

which could potentially “mask discrimination” and “nativist sentiment,” between the overbreadth of the amendment and those who would be mostly affected—national origin groups, particularly Latinos.⁵¹⁴

Similarly, in spring of 1998, after the Supreme Court had remanded the *Yñiguez* litigation to state courts, the Arizona Supreme Court ruled in *Ruiz v. Hull*⁵¹⁵ that the Arizona English-only constitutional amendment was unconstitutional under the First Amendment and Equal Protection Clause. Like the Ninth Circuit, the Arizona Court found a core First Amendment right in citizens’ ability to receive essential information from Arizona government officials⁵¹⁶ and, more generally, a fundamental “First Amendment right to petition [the government] for redress of grievances.”⁵¹⁷ Applying strict scrutiny analysis, *Ruiz* held that the English-only constitutional amendment violated the First Amendment because it was overbroad and could not meet the compelling state interest test.⁵¹⁸ The Arizona Court also found an equal protection violation because *Meyer* establishes a “fundamental, individual right of choice of language.”⁵¹⁹

protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” *Id.* at 401. The Court also found that the state had overreached in prohibiting instruction in languages other than English.

Tokushige invalidated under the Due Process Clause 1925 regulations imposed by Hawaii territorial administrators on the foreign language schools in which virtually all of the Korean, Chinese, and Japanese children were enrolled. *See Tokushige*, 273 U.S. at 290–91. The stated purpose of the regulations was to ensure that the “Americanism of the pupils may be promoted.” *Id.* at 293. The regulations imposed an annual permitting fee of \$1 per pupil, required that foreign schools submit records showing students’ names and addresses, and required teachers to be “satisfied that the applicant...is possessed of the ideals of democracy...and knows how to read, write and speak the English language.” *Id.*

The Ninth Circuit concluded that these cases show that the State interest in promoting the learning of English through English-only laws is a weak justification that cannot “outweigh the burdens imposed on First Amendment rights.” *Yñiguez*, 69 F.3d at 945.

⁵¹⁴ *Yñiguez*, 69 F.3d at 947–48 & n.33 (noting similarity of English-only with *Meyer*’s legislation targeting German Americans).

⁵¹⁵ 957 P.2d 984 (Ariz. 1998).

⁵¹⁶ *See id.* at 996–97.

⁵¹⁷ *Id.* at 997. Based on a broad construction of citizenship rights to access government, the Court found that the right to “free discussion of government affairs” included the right to communicate in the public sphere in a language other than English. *See id.* Although *Ruiz v. Hull* invalidated the Arizona English-only amendment on First Amendment and equal protection grounds, it declined to interpret *Meyer* as broadly as had the Ninth Circuit. *See id.* at 1001 n.13.

⁵¹⁸ *See id.* at 999.

⁵¹⁹ *Id.* at 1001. The amendment “violates...guarantees of equal protection because it impinges upon both the fundamental right to participate equally in the political process and the

c. Critique of Fundamental Rights Approach

The fundamental rights approach applied above is appealing in many ways, and yet it is also troubling for two important reasons. First, courts' identification of certain rights as "fundamental" inherently seems subject to question. Why these rights? What is their pedigree? Why these rights and not other rights? Because it is often unclear why the courts choose to recognize certain rights as fundamental, it is easy to fear the slippery slope. If these rights are declared as fundamental, what may follow?

Second, the fundamental rights approach requires use of a strict standard of review. Yet, as is well recognized, very few measures can ever survive strict review. Such a standard of review may prove too strong when applied to measures that have been enacted by a popular majority. Attempting to use such a standard may undercut our faith in the democratic system or in courts' ability to regulate this system.

Third, as Professor Kathleen Sullivan has noted, fundamental rights analysis channels constitutional discourse into a narrow course, justifying and building these ephemeral constitutional rights.⁵²⁰ When courts engage in such "fundamental rights" analysis, they do not address the main problem in these cases; the majority is using a democratic process to channel conflictive majority-minority issues that are both social and political and then using their numerical and political dominance to resolve them their way. These cases become enmeshed in building fundamental rights that appear to be of universal application, when in fact they arise only because there is a majority-minority dynamic at play in a democratic process.

Finally, fundamental rights analysis is infinitely subject to judicial manipulation, a result which, as stated previously, jeopardizes courts' legitimacy in this highly controversial area. The Sixth Circuit's decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,⁵²¹ illustrates the problematic nature of the fundamental rights approach. In 1991, the city of Cincinnati enacted a broad employment anti-discrimination city charter amendment that would have barred discrimination against gay men and lesbians, as well as by marital status, national origin, Appalachian regional ancestry, and persons with HIV and other handicaps.⁵²² By referendum, the people of Cincinnati repealed the equal opportunity ordinance and provided that "no special class status may be granted based upon sexual orientation, conduct or

right to petition the government for redress." *Id.* at 1002.

⁵²⁰ See Sullivan, *supra* note 471, at 241-66.

⁵²¹ 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1990).

⁵²² See *id.* at 292.

relationships.”⁵²³ The district court had struck down the referendum on the ground that *Hunter and Seattle School District No. 1* established a fundamental right to political access.⁵²⁴ The Sixth Circuit, even after the Supreme Court’s *Romer* decision, declined to use a fundamental rights analysis, or any mode of heightened analysis, to evaluate the anti-gay rights initiative.⁵²⁵ This doctrinal finding was key, and, consequently, the Sixth Circuit easily distinguished *Romer* and concluded that no significant right had been trammelled.⁵²⁶ Such a facile distinction, given the Cincinnati measure’s very strong similarities with Amendment 2, gives the appearance that the court was simply hostile to gay men and lesbians.⁵²⁷

Part V.B will propose an analytical approach that blends the fundamental rights approaches described in this Part and *Romer*’s approach that follows. Some of the critiques I have raised here will be addressed by the analytical framework proposed. However, whenever fundamental rights analysis is used, there are key issues that will nonetheless remain, as will be explained.

6. *Romer*: Prohibiting Creation of Unequal Citizenship Status

Romer v. Evans,⁵²⁸ the most recent Supreme Court case on majority-minority initiatives, is puzzling in many respects. The clearest thing about the decision is its bottom line: striking Colorado’s anti-gay rights Amendment 2.⁵²⁹ One other thing is clear: the Court does not base its decision on any of the analyses discussed earlier in this section. In fact, the Court fails even to cite any of these predecessor decisions. Although the Court applies a form of heightened review, the Court did not base its decision on a finding that gay men and lesbians

⁵²³ *Id.* at 291 (quoting Issue 3, which was enacted with 62% of the ballots cast).

⁵²⁴ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 430–32 (S.D. Ohio 1994). The district court, later to be reversed by the Sixth Circuit, held that the right to participate equally in the political process is a fundamental right protected by the Equal Protection Clause. See *id.*

⁵²⁵ See *Equality Found. of Greater Cincinnati*, 128 F.3d at 294.

⁵²⁶ See *infra* notes 541–46 and accompanying text.

⁵²⁷ Another interpretation is that the circuit court appeared confused as to how to interpret *Romer v. Evans*. Interestingly, in the Supreme Court’s denial of certiorari review, Justices Ginsberg, Souter, and Breyer noted that Supreme Court review would be premature given the unsettled state of case law. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 119 S. Ct. 365, 366 (1998).

⁵²⁸ 517 U.S. 620 (1996).

⁵²⁹ See *id.* at 621. For the text of Amendment 2, see *supra* note 504. As has been discussed, this Amendment would have proscribed any local ordinances that would bar discrimination against gay men and lesbians.

are a suspect class.⁵³⁰

The Court in *Romer* purports to employ minimal scrutiny review.⁵³¹ However, the approach that is taken is clearly not the perfunctory scrutiny that rational basis classifications receive in other contexts.⁵³² Rather, the Court applies a very close purpose review triggered by judicial concern as to why this “unpopular”⁵³³ group had been selected for “unprecedented”⁵³⁴ disfavored treatment.⁵³⁵ Pursuant to this review, the Court concluded that Amendment 2 served no legitimate state purpose and that, absent such a purpose, the “inevitable inference [is] that the disadvantage imposed is born of animosity toward the class of persons affected.”⁵³⁶ “[A] bare . . . desire to harm a politically unpopular group” cannot be supported by “conventional” review requiring a rational relationship to a legitimate governmental purpose.⁵³⁷ Such a measure further violates the Equal Protection Clause, which forbids “class

⁵³⁰ See *supra* notes 484–85 and accompanying text.

⁵³¹ See *Romer*, 517 U.S. at 631–32 (“[W]e will uphold the legislative classification so long as it bears a rational relation to some legitimate end. . . . Amendment 2 fails, indeed defies, even this conventional inquiry.” (citation omitted)).

⁵³² Commentators have provided various explanations as to whether the standard of review applied in *Romer v. Evans* was actually the minimal scrutiny that the Court claims to have applied. See *supra* note 485.

⁵³³ *Romer*, 517 U.S. at 635.

⁵³⁴ *Id.* at 633.

⁵³⁵ The Court underscores its concern with the unequal treatment afforded to gay men and lesbians by opening the opinion with a quote from Justice Harlan’s dissent in *Plessy v. Ferguson*: “[T]he Constitution ‘neither knows nor tolerates classes among citizens.’” *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The Court constructs Amendment 2 as potentially imposing far-reaching, “unprecedented disadvantage” on gay men and lesbians in three significant ways: (1) Amendment 2 singles out gay men and lesbians as a “solitary class” because it prevents them from petitioning their local government and state legislature for legislation barring discrimination, see *id.* at 627, even though such local ordinances have proven critical in the protection of gay rights; (2) Amendment 2 imposes an absolute legal disability on gay men and lesbians, see *id.* at 629–30, because it “withd[re]w from homosexuals, but not others, specific legal protection from the injuries caused by discrimination.” *Id.* at 627; see also *id.* at 631 (Amendment 2 does not permit gay men and lesbians “safeguards that others enjoy or may seek without constraint.”); (3) Amendment 2 is over-broad; it imposes excessive administrative burdens in making decisions because in all decisionmaking administrators must determine whether “homosexuality is an arbitrary and thus forbidden basis for decision.” *Id.* at 630. The Court also found that Amendment 2 reached policies as well as legislation. Administrative decisions, such as a police department’s decision to crack down on physical gay bashing, could be subject to the proscription of the Amendment. See *id.*

⁵³⁶ *Id.* at 634.

⁵³⁷ *Id.* at 635–36 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

legislation.”⁵³⁸

Although *Romer v. Evans* is well decided, it leaves too much unstated.⁵³⁹ Why the careful purpose scrutiny review, and what is the significance of the Court’s recurring construction of gay men and lesbians as a “class”? The Court strains to construct Amendment 2 as remarkable and unique. But the text of Amendment 2 is not unique; it mirrors the close to forty anti-gay civil rights initiatives and referendums that other communities have enacted. Nor is the majority backlash occasioned by the Denver and Boulder anti-discrimination ordinances unique to Colorado voters. Furthermore, the Court fails to make sense of the important prior case law—*Hunter*, *Reitman*, *Seattle School District No. 1*—never citing any of these cases for doctrinal purposes. Neither does the Court attempt to reconcile *Bowers v. Hardwick*’s very deferential review of Georgia’s sodomy statute with the close scrutiny that the Court applies in *Romer*.⁵⁴⁰ The Court failed to clarify the most bare doctrinal outlines of how courts should resolve in the future similar initiatives and referendums that embody majority-minority conflicts.

The Sixth Circuit’s interpretation of *Romer v. Evans* in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*⁵⁴¹ again illustrates the importance of the Court having failed to articulate why gay men and lesbians in the context of Amendment 2 received a more careful judicial review. As discussed above, the Sixth Circuit concluded that, as a matter of law, neither *Romer v. Evans* nor the court’s own construction of the Cincinnati referendum required that the court subject the referendum to any form of heightened scrutiny.⁵⁴² The Sixth Circuit distinguished *Romer v. Evans* relatively easily.

⁵³⁸ See *id.* at 635.

⁵³⁹ The result in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* is not an application of Professor Sunstein’s “leaving things undecided” thesis. See SUNSTEIN, *supra* note 382; Sunstein, *Public/Private*, *supra* note 391. Revoking anti-discrimination protections for, at best, “unpopular,” and, at worst, sometimes hated, minorities is not “leaving things undecided.” Rather, the court has failed to perform a basic judicial function in a pluralist democracy, ensuring that majoritarian actions do not diminish minorities’ minimum safeguards and rights under constitutional law. See Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 230–31.

⁵⁴⁰ Compare Marc A. Fajer, *Bowers v. Hardwick, Romer v. Evans, and the Meaning of Anti-Discrimination Legislation*, 2 NAT’L J. SEXUAL ORIENTATION L. 208 (1996), available at (visited Mar. 8, 1999) <<http://www.sunsite.unc.edu/gaylaw>> (arguing that *Bowers* did not apply in *Romer* because, contrary to Justice Scalia’s dissenting opinion, *Romer* dealt with a denial on the basis of status of basic civil rights accorded members of the polity), with Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373 (1997) (arguing that *Romer* overrules *Bowers v. Hardwick* because these cases are inconsistent).

⁵⁴¹ 128 F.3d 289 (6th Cir. 1997).

⁵⁴² See *id.* at 293 (noting that no suspect class status or fundamental right was involved).

First, the Cincinnati ordinance was not as far reaching because it limited itself to proscribing "special class status" for gay men and lesbians. This meant, according to the circuit court, that only gay men and lesbians could not be included as beneficiaries of affirmative action programs.⁵⁴³ As to the more problematic repeal of anti-discrimination protections, the Court observed that anti-discrimination protection for homosexuals was a "special privilege," contrary to the *Romer* Court's observation that access to appeal for anti-discrimination legislation was a basic democratic process avenue that all minority groups should enjoy. Moreover, the circuit court stated that *Romer*'s rational basis review standard made "public discrimination . . . permissible . . . as long as such official discrimination is rationally related to some valid public interest."⁵⁴⁴ The stated public interest was "to preserve community values and character,"⁵⁴⁵ the very same purpose that the proponents of Amendment 2 had set forth.⁵⁴⁶ In short, because the Supreme Court in *Romer* failed to adequately set out the basis for its decision, the Sixth Circuit was able to reach a contrary result on virtually identical facts. Much more is needed if courts are to be able to deal with the fractious political issues posed by majority-minority initiatives and referendums.

V. RECONCEPTUALIZING THE JUDICIAL APPROACH

The essential idea is that deliberative democracy . . . require[s] that reasons [given for public decisions, such as voting] be consistent with citizens' mutual recognition as equals While the conditions of a constitutional democracy tend to force groups to advocate more compromising and reasonable views if they are to be influential, the mix of views and reasons in a vote in which citizens lack awareness of such guidelines may easily lead to injustice, even though the outcome of the procedure is legitimate It is part of the citizens' sense of themselves, not only collectively but also individually, to recognize political authority as deriving from them and that they are responsible for what it

⁵⁴³ See *id.* at 296.

⁵⁴⁴ *Id.* at 297 n.8. It is telling that the Sixth Circuit deals with the most problematic aspect of the referendum in a footnote. See *id.*

⁵⁴⁵ *Id.* at 297. I do not wish to appear to be dismissive of the culturally conservative majority's concern that greater tolerance of gay men and lesbians in the public domain could compromise conservative cultural values. My criticism is that the circuit court treated these very important issues at a very superficial level.

⁵⁴⁶ This is clear in the Colorado Supreme Court's opinion in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1995) (en banc) (*Romer II*), which forms part of the record. The Colorado Supreme Court addresses the contentions of petitioners that Amendment 2 promotes family values and protects the right of the majority to teach their children moral values. See *id.* at 1342.

does in their names [O]ur considered judgments . . . such as the condemned institutions of slavery and serfdom, religious persecution, the subjection of the working classes, the oppression of women . . . stand in the background as substantive checks showing the illusory character of any allegedly purely procedural ideas of legitimacy and political justice.

John Rawls⁵⁴⁷

The case has been made in Part II that direct democracy is an important and vital vehicle of political expression. It acts as a check on legislatures and representatives that may have become too entrenched and disconnected from those who they are supposed to represent. Direct democracy is also a vehicle by which the electorate can send messages to their representatives stating that the way that they are conducting the business of government does not meet with the voters' approval.⁵⁴⁸ Sometimes, for better or worse, direct democracy broaches subjects that have been taboo with representatives.⁵⁴⁹ Lastly, direct democracy is viewed by the people of major Western states as being a vital institution of their civic expression.⁵⁵⁰ For these reasons, the institution of direct democracy has a place in democratic lawmaking.

Nonetheless, direct democracy has an underside that has always been troubling. Politics, by its nature, is often heated, controversial, and contested. Part III has shown how direct democracy can evoke intergroup strife, feelings of resentment, anxiety over social change, and even prejudice in its rawest form. Sometimes these results are brought about purposefully and through the manipulation efforts of a handful of people. When these intergroup conflicts combine with ballot box lawmaking, direct democracy has the potential to seriously damage a civic fabric already frayed by the ongoing political conflicts of a polity undergoing fundamental changes. This social and political context places a great deal of pressure on the courts. However, Part IV has shown that the Court's approach in this very important area is inconsistent and incoherent, thereby also leaving courts vulnerable to the charge that they are "thwarting the will of the people."

This Part outlines an alternative coherent and principled approach, arguing that the Court should skeptically review those direct democracy initiatives that

⁵⁴⁷ RAWLS, *supra* note 28, at 430–31.

⁵⁴⁸ This was said to be the reason that motivated Proposition 13. *See supra* notes 60–65 and accompanying text. *See generally* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1350 (1985) (arguing that direct democracy is an important indirect check on legislatures, even when not successful).

⁵⁴⁹ Both term limits and affirmative action are said to be such examples. *See* ISSACHAROFF ET AL., *supra* note 30, at 672.

⁵⁵⁰ *See supra* Part II.

impinge on minorities' citizenship rights. This proposal is not entirely new. Professor Eule has advocated a rule of skepticism based on arguments that direct democracy does not provide the necessary structural filters and that the deliberative process is lacking.⁵⁵¹ Professor Bell has also argued that because "the initiative and referendum may operate as a nonracial facade covering distinctly discriminatory measure.... The evidence... justifies a heightened scrutiny of ballot legislation..."⁵⁵²

Yet, as Professor Charlow observes, commentators have not yet formulated a convincing case for why such heightened review of direct democracy is necessary, nor how it should be conducted.⁵⁵³ After all, democratic actors within the representative processes, like individual voters, may also fail to act conscientiously, dispassionately, and deliberatively.⁵⁵⁴ The remainder of this Part attempts to meet this challenge. Part V.A justifies why heightened review is necessary. Part V.B then elaborates how the review should be conducted and argues that while the results of many of the Supreme Court's decisions are correct, the Court's analyses are more comprehensible and more consistent when examined in terms of citizenship impact. It further suggests that some of the Court's cases may have been incorrectly decided. Finally, Part V.C applies this test to some of the most recent and most controversial initiatives.

A. The Equal Protection Clause and Conflicts Between Majorities and Minorities

1. Majority-Minority Conflicts and Theories of Equal Protection

In order to formulate a standard for reviewing direct democracy measures under the Equal Protection Clause, one must first focus on what values this clause is intended to protect, and what functions it is designed to serve.

⁵⁵¹ See Eule, *supra* note 27, at 1558 ("[T]he judiciary must compensate for process defects. It must serve as the first line of defense for minority interest; a backup is no longer adequate. The absence of structural safeguards demands that the judge take a harder look."). Professor Eule argues that representatives are more likely to engage in rational deliberation. See *id.* at 1525–30, 1550–56. Deliberation acts as a filter because "[p]ublic debate among those of equal status and eloquence thus ultimately leads to a realization of the common good." *Id.* at 1527.

⁵⁵² Bell, *supra* note 82, at 23. Professor Gunn also advocates an "automatic heightened level of scrutiny when lawmaking procedures deprive minority groups of fundamental safeguards." Gunn, *supra* note 88, at 158.

⁵⁵³ See Charlow, *supra* note 98, at 607–08 (noting that advocates of heightened scrutiny fail to justify "why those; what oversight; and why that particular oversight"); Tushnet, *supra* note 98, at 373–76 (remaining unconvinced).

⁵⁵⁴ Professor Baker makes this point most cogently. See Baker, *supra* note 98, at 738–50.

Commentators and courts have offered at least three alternative visions. One approach views the Equal Protection Clause as embodying no independent values other than a concern that lawmakers employ classifications that bear a "rational relationship" to the stated legislative goals.⁵⁵⁵ Taken literally, such an approach would prevent courts from performing virtually any meaningful review of legislative or popular actions. It is easy to justify virtually any action using such an analysis.

According to the second approach, the Equal Protection Clause is concerned with proscribing discrimination against protected classes.⁵⁵⁶ For example, Professor Ely's process theory⁵⁵⁷ and *United States v. Carolene Products Co.*'s footnote four,⁵⁵⁸ argue for higher scrutiny wherever there is "prejudice against discrete and insular minorities."⁵⁵⁹ Professor Ely observes that lawmakers do not always represent minorities' interests because prejudice is a lens that prevents rational thinking and empathetic understanding.⁵⁶⁰ Ely explains that the dynamics of prejudice can break down democratic norms because prejudice "provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society."⁵⁶¹ Part III showed that a wide variety of kinds of "prejudices," from homophobia to racial resentment, could be said to have motivated voters.

However, Professor Ackerman and others have convincingly shown this second approach is both too narrow and too broad.⁵⁶² Process theory calls upon the judge not only to decide which groups are "discrete and insular," but also to establish what is "prejudice," to make judgments about what kinds of prejudice count, and to determine why such prejudice is harmful to a particular minority

⁵⁵⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Stewart, J., concurring) ("Unlike other provisions of the Constitution, [equal protection] confers no substantive rights and creates no substantive liberties." (footnote omitted)). See generally Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

⁵⁵⁶ The anti-discrimination principle, which constitutional scholars locate as originating in a line of cases connecting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Korematsu v. United States*, 323 U.S. 214 (1944), and ultimately *Brown v. Board of Education*, 347 U.S. 483 (1954), stands for the proposition that the Constitution proscribes discrimination based on classifications and other decisions that depend on race. See generally Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

⁵⁵⁷ See *supra* notes 392–93.

⁵⁵⁸ 304 U.S. 144, 152–53 n.4 (1938).

⁵⁵⁹ *Id.*

⁵⁶⁰ See ELY, *supra* note 392, at 77–88.

⁵⁶¹ *Id.* at 153 (quoting THE FEDERALIST NO. 51 (James Madison)).

⁵⁶² See Ackerman, *supra* note 411, at 713.

and the democratic process. These are substantive judgments.⁵⁶³ Part III has shown not only that social scientists are unable to make such findings without controversy, but also that “prejudice,” as understood by the experts, is pervasive and potentially infects every aspect of democratic lawmaking. Thus, the exception for “prejudice” can swallow up the rule that judges should defer to democratic lawmaking. For the same sets of reasons, it is vain to attempt to distinguish between measures using an “intent” analysis.

The third position, and the one at the core of this argument, is that the Equal Protection Clause embodies foundational norms that safeguard the democratic process and the values of a democratic polity.⁵⁶⁴ One adherent of this view, Professor Sunstein, has focused on the tension between constitutional values and the factionalism of pluralist politics. Sunstein suggests that a central function of the Equal Protection and Due Process Clauses is to provide a check on the give and take of pluralist politics because republican lawmaking requires that laws be the product of deliberation.⁵⁶⁵ That is, both clauses embody a norm that constrains “raw exercises of power” and “naked preferences” and requires that laws promote, instead, some public value.⁵⁶⁶

⁵⁶³ See *id.* at 740 (“If *Carolene* somehow hoped to find a shortcut around this substantive inquiry into constitutional values, its journey was fated to fail from the outset. The difference between the things we call ‘prejudice’ and the things we call ‘principle’ is in the end a substantive moral difference. And if the courts are authorized to protect the victims of certain ‘prejudices,’ it can only be because the Constitution has placed certain normative judgments beyond the pale of legitimacy.”).

⁵⁶⁴ See GUNTHER & SULLIVAN, *supra* note 31, at 840–41 (delineating this approach); cf. ISSACHAROFF ET AL., *supra* note 30, at 1–8 (arguing that the Constitution is concerned with the politics of democracy and that voting rights, vote dilution, and citizen participation cases are concerned with preventing the undue manipulation of democratic processes); Balkin, *supra* note 341, at 2315 (describing status conflict as ongoing condition that the Equal Protection Clause must address); Schacter, *Romer and Democracy*, *supra* note 30, at 397–405 (arguing that equal protection is concerned with the exclusion of gay men and lesbians from the democratic sphere).

⁵⁶⁵ See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985–1986) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*]; Sunstein, *Public/Private*, *supra* note 391.

⁵⁶⁶ See Sunstein, *Interest Groups*, *supra* note 565, at 50–51 (what violates constitutional norms is “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain governmental assistance”); see also Sunstein, *Naked Preferences*, *supra* note 565, at 1689. Sunstein explains that equal protection and due process review ensure that legislative political outcomes are “rational,” and that the legislative process is not subverted to benefit one single faction. See Sunstein, *Interest Groups*, *supra* note 565, at 49 (“The core demand of the equal protection and due process clauses, for example, is that measures taken by legislatures or administrators must

John Rawls provides another normative framework based on democratic political values. For Rawls, judicial review ensures that laws, whether products of legislatures or direct democracy, reflect the fundamental values of the people.⁵⁶⁷ As the passage at the beginning of this Part indicates, the Court should ensure that, in the give and take of pluralist politics, voters do not enact laws that do not give a good account of themselves.⁵⁶⁸ Instead, in making law through initiatives, referendums, or the legislative process, we must observe the foundational democratic principles of co-equality and co-participation. Rawls defines these as among the minimum conditions that free individuals would choose for themselves in a democratic polity with no pre-commitment to any system of justice.⁵⁶⁹

Professor Martha Minow's "relational approach" improvises on the political participation approach to equal protection. Minow focuses not on rights, but on how constitutional norms construct relations between distinct groups, majorities and minorities. She explains that majorities and minorities will hold different comprehensive ideologies and will understand the world from fundamentally divergent perspectives because each group will form knowledge from a different social experience.⁵⁷⁰ She argues that the Equal Protection Clause should focus

be 'rational' . . . The rationality requirement may . . . be understood . . . as a requirement that regulatory measures be something other than a response to political pressure."). Like Ely, Sunstein draws richly from James Madison's *Federalist No. 51*. See THE FEDERALIST NO. 51 (James Madison) ("[A] republic must guard the society against the oppression of one part of the society against the injustice of the other parts. If a majority be united by a common interest, the rights of the minority will be insecure.").

⁵⁶⁷ Rawls explains this concept as follows:

[The Court] must be, and appear to be, interpreting the same constitution in view of what they see as the relevant parts of the political conception and in good faith believe it can be defended as such. The court's role as the highest judicial interpreter of the constitution supposes that the political conceptions judges hold and their views of constitutional essentials locate the central range of the basic freedoms in more or less the same place. In these cases . . . its decisions succeed in settling the most fundamental political questions.

RAWLS, *supra* note 28, at 237.

⁵⁶⁸ See *supra* note 547 and accompanying text.

⁵⁶⁹ As in any philosophical work, the beginning premises are key to understanding the value judgements implicit in Rawls's model. Rawls argues that political power emanates from free and equal citizens, who are rational and reasonable. See RAWLS, *supra* note 28, at 135–36. Each citizen is due respect and equal dignity as a co-equal member of the polity. In closed systems, political power must be exercised in a way that secures the cooperation of individuals over generations. See *id.* at 137. Only if the state respects the reasonable and rational positions of all participants can the state secure their social cooperation required for a closed system to remain stable over the long run. See *id.* at 35.

⁵⁷⁰ See MINOW, *supra* note 28; Martha Minow, *The Supreme Court 1986 Term—*

on building connectedness among such groups.

In my own prior work, *Democracy and Inclusion*, I have attempted to blend these approaches by incorporating Rawls's constructs of co-equality and co-participation into Minow's relational model.⁵⁷¹ When a democratic polity is made up of diverse groups, or, as defined here, multiple majorities and minorities, agreement on fundamental issues will be inherently difficult. Therefore, such a polity must elaborate rules for long-term co-existence that accepts, as a given, fundamental cognitive and value differences and anticipates ongoing conflict. As Rawls puts it, the principles of co-equality and co-participation obligate participants to be bound by a norm, which Rawls calls "reciprocity,"⁵⁷² to constrain public discourse. This norm ensures that those who are different and will likely disagree can continue long-term co-existence.⁵⁷³ In the context of constitutional principles, these should be formulated to ensure that no particular minority's, or majority's, way of knowing or value systems are

Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987). Minow describes her own work as the "social relations approach." She explains that the relational approach:

emphasize[s] the basic connectedness between people and the injuries that result from social isolation and exclusion. The relational focus also assists an understanding of difference as a function of comparisons between people... [and] rejects distinctions drawn between people which express or confirm the distribution of power in ways that harm the less powerful. [Its] roots... [are] in [examining] relationships rather than... discrete items.... I have been most helped by the elaboration... [of] [f]eminist work [that] shows the power of connections, alongside distinctions....

MINOW, *supra* note 28, at 379–80. Frank Michelman's model of civic republicanism also contains these elements. He argues that the law should constantly seek to include "the other... the hitherto excluded." Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1529 (1980).

⁵⁷¹ See Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 206–32. Rawls's work assumes a model of pluralist polity. He presupposes that participants in society will always disagree because incompatible philosophies are the natural result of human reason. See RAWLS, *supra* note 28, at xviii; see also *id.* at 36 ("[D]iversity of reasonable comprehensive... doctrines found in modern societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.").

⁵⁷² See RAWLS, *supra* note 28, at 17 ("[R]eciprocity is a relation between free and equal citizens in a well ordered society."); see also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 73 (1996) ("A deliberative disagreement is one in which citizens continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable.").

⁵⁷³ According to Rawls, complex pluralist societies do not necessarily reach certainty or "truths." But if pluralist societies engage in public reason according to principles of reciprocity, then they can reach "overlapping consensus"—reasonably compatible ideas about justice. See RAWLS, *supra* note 28, at xlvii, 39–40.

imposed on others as constitutional norms. This requires that the Court not formulate unduly broad principles; but, at the same time, it requires that the Court vigorously intervene and protect minority rights to ensure their ongoing inclusion in the formulation of the polity's values.

Each of these models of democratic co-equality and co-participation offer courts a powerful tool with which to regulate constitutional discourse. Courts are responsible for ensuring that majority-minority conflicts will take place within a legal discourse that ensures that each person, minority or majority, preserves a relationship and understanding of the other's significance to the long-term welfare of the polity as a whole.⁵⁷⁴ When the majority exercises raw power with respect to a minority, the majority imposes its "truth," epistemology, or comprehensive view on a co-equal co-participant and, thus, oppresses that minority.⁵⁷⁵ Long-term stability is jeopardized where a majority demonstrates

⁵⁷⁴ For Sunstein, minorities are political minorities, and courts must use the Due Process and Equal Protection Clauses to prevent "naked" exercises of power against such groups. *See* Sunstein, *Interest Groups*, *supra* note 565, at 46. I interpret Rawls to support the view that a minority can be a group that has developed its own comprehensive views because its members occupy distinct social space. This view of minorities as having a distinct epistemological orientation is supported by feminist standpoint theory and, more generally, postmodernism's social construction of knowledge thesis. *See* Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 187–88 ("For purposes of the inquiry of how it is that minority and majority communities form distinct epistemological communities, the key insight is that social position matters in what we experience, how we interpret that experience, and how we construct knowledge In the aggregate and over the long run, individual minorities share a band of social space from which they experience social life differently from majorities. It is this experience that creates a distinct epistemology, not minority status or identity."); *see also* IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 25 (1997) ("The collective otherness of serialized existence is thus often experienced as constraint, felt necessities that often are experienced as given or natural. Members of the series experience themselves as powerless to alter this material milieu, and they understand that others in the series are equally constrained."); Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 *BERKELEY J. SOC.* 1, 3 (1987) ("[R]eality is nothing other than the structure, as a set of constant relationships which are often invisible, because they are obscured by the realities of ordinary sense-experience, and by individuals in particular [W]hat exists is not 'social classes' as understood in the realist . . . but rather a *social space* [in which] . . . the fundamental property of a space is the reciprocal externality of the objects it encloses."); Patricia Hill Collins, *Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Where's the Power?*, 22 *SIGNS* 375, 378 (1997) ("[S]tandpoint theory . . . explain[s] relations of race and/or social class Given the high degree of residential occupational segregation separating Black and/or working-class groups from White middle-class realities, it becomes plausible to generate arguments about working-class and/or Black culture that emerge from long-standing shared experiences.").

⁵⁷⁵ The epistemological and philosophical position of each member is respected because

continued lack of regard for the “other” in ways that reject the other’s fundamental sense of who they are.⁵⁷⁶

The co-equality and co-participation model is well suited to deal with the multiple and complex ways in which prejudice impacts the democratic fabric of the polity. If “prejudice” encompasses status conflicts, racial resentment, a desire for continued domination, discomfort with what is considered out of the norm, as well as homophobia and nativism, then “prejudice” describes an ongoing social dynamic. In a democratic polity made up of unequal groups, and where history, class, and social norms construct one group as dominant and their perspective as the norm, *conflicts are a foreseeable consequence*. Using such a model does not require courts to distinguish between these types of feelings, to identify discriminatory intent, or to choose which minority groups are properly treated as “suspect” classes. For these reasons, it is, in this author’s view, the most powerful and most useful equal protection tool for dealing with majority-minority disputes. The next Part will examine how these norms should be applied to direct democracy measures.

2. The Case for Skeptical Review of Direct Democracy Measures

According to empirical evidence, as well as theory, initiatives and referendums dramatically increase the potential that actions taken by majority groups will jeopardize minority group members’ ability to participate fully in the life of the polity. In so doing, such direct democracy measures threaten the cohesion and stability of the entire society. Because these “referendums on minorities” take place within the ambit of the polity’s democratic processes, the votes become a statement by the polity of who really belongs as a co-equal co-participant. What might be internecine tensions become an irrevocable statement by the polity of who is a citizen and what kind of a citizen. For this reason, such measures must be strictly scrutinized, as described in Part V.B, by the courts.⁵⁷⁷

this is what we would expect for ourselves. Respecting the integrity of each person’s deeply held beliefs as well as “ways of knowing” means that no participant is coerced into accepting ways of knowing or moral frameworks. See RAWLS, *supra* note 28, at 49–54.

⁵⁷⁶ Rawls finds in the democratic principle of co-equality and the necessity of long-term social cooperation a substantive obligation of sustained, mutual, public-reasoned justification. See *id.* at 15–22.

⁵⁷⁷ As Cass Sunstein has explained, the level of scrutiny in equal protection law reflects a rule of thumb judgment as to how likely the lawmaking process is to create categories that impinge on constitutional norms. See Sunstein, *Public/Private*, *supra* note 391, at 55–56 (“The public value justification must survive critical scrutiny designed to ensure that it is not itself a product of existing relations of power.”); see also SUNSTEIN, *supra* note 382, at 38 (suggesting that constitutional norms should be formulated on the available social science evidence and not theoretical premises that are subject to wide contestation). Professor Schacter’s analysis of

Although, as has been noted, direct democracy does not *uniquely* threaten co-participation, it does heighten the risks of exclusion in at least four fundamental and interrelated ways. First, when voters are permitted to directly express their views on fundamental ideological issues, the majority is provided an opportunity to express feelings that delve beneath the veneer of civility.⁵⁷⁸ In the context of direct democracy, overtly prejudiced and nativist views are expressed, whereas the most blatant opinions are likely to be stifled in the representational forum. Politicians' own rhetoric also tends to become more blunt and pointed.⁵⁷⁹ Examples of this phenomenon include Governor Pete Wilson's repeated reference to the streaming brown hordes, Anita Bryant's overtly homophobic comments, and the refrain that African Americans have received undeserved special benefits. Such statements are most obvious if the expression of prejudice continues to be acceptable and permitted, as is the case with comments directed against illegal immigrants and gay men and lesbians. When society has developed taboos against overt oppression, as is currently the case with racial prejudice, the damaging statements are more subtle, but nonetheless remain real.

Second, the nature of direct democracy, particularly combined with the realities of modern day politics, tends to promote "we-they" thinking. Especially in those jurisdictions with no minimal substantive screening and which provide few checks on electoral politics and media campaigns, initiatives and referendums permit proponents to frame the issues to set off intergroup divisions. As John Madison famously observed, factionalist politics are more likely to plague local lawmaking processes, while a larger representative system, like the House of Representatives, would "restrain majorities from enacting oppressive measures."⁵⁸⁰ Whether the breakdown is gay versus straight, monolingual versus bilingual, black versus white, or legal versus illegal, majorities are invited to think about complex issues in ways that promote "we-they" thinking. Analyses

Romer takes a similar approach to that proposed here. See Schacter, *Romer and Democracy*, *supra* note 30. She argues that the Court should focus on the democratic implications of majority votes on initiatives such as the Colorado Amendment 2. See *id.* at 391. She also argues that a majority vote in a contested and potentially fractious debate can be viewed as a communal judgment that stigmatizes and excludes from the polity a targeted minority. See *id.* at 400-01.

⁵⁷⁸ See JUDITH SHKLAR, *ORDINARY VICES* 45-86 (1984) (describing how various kinds of veneers, including hypocrisy, interact in a liberal democracy to permit co-existence).

⁵⁷⁹ There are also notable counter-examples of politicians attempting to inject into the debate more reasoned terms, as was the case with the affirmative action debate in Washington, by Governor Locke, and in Houston, by Mayor Bob Lanier. See Verhovek, *supra* note 274, at A1 (discussing Washington's Initiative 200); Verhovek, *supra* note 266, at A28 (discussing Houston's affirmative action referendum).

⁵⁸⁰ THE FEDERALIST NO. 51 (James Madison).

have shown the key role that intergroup tensions (latent racial tensions, anxieties, and suspicions and fears) play in motivating votes. Such “we-they” framing of issues has led to consequences that can fundamentally affect the polity, diminish the citizenship of minorities, and compromise the state’s needed neutrality in conflicts that may be as much social as they are political.

Third, direct democracy is easily subject to manipulation through framing. Voters do not necessarily have or take the time to study the issues in detail. Rather, they often base their votes on summaries and incomplete information. The anti-gay and anti-affirmative action measures were deliberately framed as denials of special rights rather than as harmful acts. The English-only measures have been framed as pro-melting pot, rather than as anti-minority. These measures have succeeded in large part because of such manipulation.

Fourth and most important, cultural-ideological initiatives set up a scenario where majorities cast votes on the minorities’ very membership in the polity, and where the minorities almost always lose. Such losses can have a severe and detrimental effect on the minority group members’ feelings as to whether they are accepted members of the polity. Votes are deeply symbolic and are important civic statements. Thus, while majorities may believe (and tell themselves) that they are voting in a simple political ideological contest, and while many in the majority may harbor no feelings of resentment or prejudice towards minorities, those who lose interpret this vote far more dramatically. The ideological issues presented to the voters, who vote yes or no, contain no room to allow majorities to qualify their vote. For the predictable losers, minorities, the “political” loss is also a civic loss. It is experienced as a rejection of self, their way of being and knowing, and their membership in the polity.⁵⁸¹ The majority, through a vote, can even create “castes” as alluded to in *Romer v. Evans*. In this respect, the power of the state is usurped for self-serving purposes. Yet, a polity made up of fundamentally unlike groups, majorities and minorities, must be able to co-exist and survive deep disagreement. This cannot happen when majorities can use the political process, in a public and powerful way, to reject one segment of the polity and take away from them a sense of themselves. The results are alienation and fragmentation. They are far-reaching and deeply impacting. Initiatives and referendums can lead to unintended, but permanent, results: the exclusion in some significant way of minorities from the polity.

Courts, as democratic actors, have a role in structuring these civic dialogues.⁵⁸² The relationship between majorities and minorities must remain sufficiently open so that each can recognize that their long-term co-existence

⁵⁸¹ See Schacter, *Romer and Democracy*, *supra* note 30, at 400–01 (arguing that *Romer*, and constitutional law more generally, should be concerned with communal stigmatizing judgments as evidenced in a direct democracy vote).

⁵⁸² See Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 225–32.

depends on their ability to regard each other, no matter how different and foreign they may seem to one another, as co-equal co-participants.⁵⁸³ We can now turn to how standards of review can be applied to advance these various norms. Although courts cannot divine the intent of voters, heightened review can allow courts room to construct these initiatives to better reflect permissible purposes.⁵⁸⁴

B. *How To Review Direct Democracy: Romer v. Evans Rightly Understood*

The second aspect of Charlow's challenge is to articulate how a heightened review standard should be applied. The Court's previous jurisprudence, and particularly *Romer v. Evans*,⁵⁸⁵ provides the blue print. However, the Court must articulate the approach it has employed more clearly. In its current form, *Romer* does not offer courts sufficient guidance on how to review these important measures.

This Article argues that the Court has implicitly employed, and should employ, a strict scrutiny analysis to determine whether direct democracy measures have violated the Equal Protection Clause by unduly infringing on minorities' participation rights. The appropriate analysis has two major components. First, the Court must determine whether the particular democratic initiative or referendum severely jeopardizes minorities' participation rights. Second, where such a harm exists, the Court should use standard strict scrutiny analysis and allow the direct democracy measure to stand, notwithstanding the harm it has caused, only if the measure is necessary to serve a compelling state interest. In essence, this Article argues that the Court has implicitly identified, and should explicitly recognize, a fundamental right to civic participation.

Some may be uncomfortable, rather understandably, with the identification and advocacy of a new "fundamental right." As discussed earlier, the introduction of new fundamental rights causes many to fear the onslaught of the slippery slope.⁵⁸⁶ The Court itself has refused to adopt such nomenclature in several direct democracy cases.⁵⁸⁷ To this valid critique, I offer three responses.

⁵⁸³ See *id.* at 217–18.

⁵⁸⁴ See Schacter, *Direct Democracy and Intent*, *supra* note 30 (advocating this approach to interpretation of initiatives and referendums).

⁵⁸⁵ 517 U.S. 620 (1996).

⁵⁸⁶ See *supra* Part IV.C.5.c.

⁵⁸⁷ In *Romer*, for example, the Court takes pains to clarify that the right to petition for anti-discrimination legislation is not a constitutional right, but rather develops through common law and civic activism. See *Romer*, 517 U.S. at 627–28 ("The common law rules . . . proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not

First, the fundamental right that is suggested is limited. As is illustrated in Part V.C, it will not lead to the wholesale gutting of direct democracy measures. Second, notwithstanding its rhetoric, the Court has, in fact, *sub silentio*, employed a test that is a version of this proposed “fundamental rights” analysis. Public reason requires that the Court be frank and clear in its approach and communicate to the polity the values that its tests and decisions further. Attempting to shoehorn a fundamental rights analysis into rational basis language will inevitably lead to inconsistent results and will also allow judges to exercise too much discretion. Third, in *Democracy and Inclusion*, I have argued that judges should adopt a more rigorous mode of public reason that narrows the discretion and doctrinal manipulation of judges, yet furthers the foundational values espoused here: meaningful inclusion of majorities and minorities in the ongoing civic dialogue.⁵⁸⁸ As argued there, I believe that if judges were to adopt this mode of legal analysis, decisions, which will always involve choices of values, would better stand up to legitimacy challenges.⁵⁸⁹ I turn now to the details of the analysis.

1. *Does the Initiative or Referendum Severely Jeopardize a Minority’s Civic Participation Rights?*

a. *Is the Harmed Group a “Minority”?*

The Court should concern itself with protecting all “minority” groups and not merely those groups that have or could be identified as “suspect classes.”⁵⁹⁰ As both theoreticians⁵⁹¹ and the social science analysis of Part III.B have

give Congress a general power to prohibit discrimination in public accommodations.”). Likewise, the right of outsiders to be integrated into mainstream community is not a constitutional right. *Valtierra* and *City of Eastlake* establish that zoning laws and citizen referendums can enact ordinances that are neutral on their face, but foreseeably have the effect of placing barriers by income and race on those who can enter largely homogeneous communities.

⁵⁸⁸ See Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 209–21.

⁵⁸⁹ See *id.* at 206–09.

⁵⁹⁰ Under the definition of minority groups adopted, see *supra* note 14, all of the groups that have been the object of anti-minority initiatives would be covered, as well as women. See *supra* Part III; *supra* notes 14, 93. The dynamic that is key for the delineation of minority groups that the Court should be concerned with is this: majorities are motivated to fence minorities out of the civic polity because they harbor negative or hostile social identity feelings towards them; that is, they harbor “prejudice,” as broadly as documented and described in *supra* Part III.B, Part III.C.1.

⁵⁹¹ Race/ethnicity categories are now being destabilized to focus more intensely on the dynamics of racialization. See, e.g., John O. Calmore, *Critical Race Theory*, Archie Shepp, and

demonstrated, many kinds of groups are subject to targeting by majorities. Because the Court has been reluctant to interpret the phrase "suspect class" broadly, and given political realities, it is essential that courts concern themselves with protecting a broader grouping of minorities.⁵⁹²

The Court itself has already implicitly recognized the value of such an approach, refusing to limit heightened review under the Equal Protection Clause to protected classes. In *Romer*, the Court employs a review that clearly goes beyond "rational basis," recognizing that gay men and lesbians are unpopular and may be the target of a majority's opprobrium.⁵⁹³ Yet, the Court scrupulously avoids either categorizing gay men or lesbians as a suspect class or even citing any race cases. Similarly, in *Cleburne*, the Court rejects the argument that the mentally disabled should be a suspect class,⁵⁹⁴ but nonetheless employs more than a rational basis review in striking the city council's refusal to grant a permit to a group home for the mentally disabled. Its analysis identifies the mentally disabled as a group that has been the object of "continuing antipathy or prejudice."⁵⁹⁵ In both cases, the concern is properly for a dynamic and how that dynamic interacts with the process of lawmaking. The Court is looking for the intersection of a political minority and social class ideological minority (race, culture-language, mental disability, sexual orientation) against whom the majority might be expressing any form of prejudice, or whose different way of being cannot co-exist with a majority's cultural ideology.

The purpose of focusing on a dynamic is to bring the courts' attention to the reason for the classification and treatment under the law. Does this initiative trigger within the majority a "common interest,"⁵⁹⁶ in the form of anti-minority sentiments, to exercise its dominant power? If there is a link, then the majority is

Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, 65 S. CAL. L. REV. 2129, 2160 (1992) ("['R]ace' is not a fixed term. Instead, 'race' is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle."); Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, REPRESENTATIONS, Summer 1996, at 155 (arguing for a more complex and nuanced understanding of affirmative action that is "attentive to how distinct political positions socially construct and represent Asian Americans"); see also Symposium, *Our Private Obsession, Our Public Sin*, 15 LAW & INEQ. J. 1 (1997) (containing works discussing the complexity of race).

⁵⁹² By contrast, courts need not concern themselves with protecting majority group members, as their rights to participate fully in the polity are secure.

⁵⁹³ See *Romer v. Evans*, 517 U.S. 620, 622 (1996); *supra* note 619.

⁵⁹⁴ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-46 (1988).

⁵⁹⁵ *Id.* at 443. In *Cleburne*, city council representatives who had an eye on the sentiments of the political majority "single[d] out the retarded for special treatment reflect[ing] the real and undeniable differences between the retarded and others." *Id.* at 444.

⁵⁹⁶ See THE FEDERALIST NO. 51 (James Madison).

potentially using its political power outside of constitutional norms to reinforce and legitimize the difference, to subordinate and stigmatize the minority, and to “fence them out” from co-equal civic participation.⁵⁹⁷ In *Romer*, when the Court concludes that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,”⁵⁹⁸ what is meant is that the law is an expression of that majority’s power, both political and social-cultural, and that what has motivated the majority in this case is a generalized “animus” against the affected minority. This aspect of the *Romer* decision must be preserved.⁵⁹⁹

b. *Have the Minority’s Civic Participation Rights Been Severely Impinged?*

The analysis suggested thus far would still make for a very broad-based analysis. If it is true that conflict is an ongoing condition of a heterogeneous polity, there are many minorities against whom the majority might express a desire to harm.⁶⁰⁰ Furthermore, because majorities dominate politics, as well as social and cultural life, the opportunities to manipulate the political process to reinforce and legitimize their social/class dominance are endless. Thus, this part of the analysis looks to whether the initiative or referendum has sufficiently harmed minorities’ civic participation rights or citizenship so as to require strict scrutiny.

This Article proposes that courts analyze the potential impact of direct democracy measures on minorities’ civic participation rights in terms of three elements: (i) direct political participation impact; (ii) stigmatic harm; and (iii) civil society detriment. Where, having considered the effects in all three categories, courts find that the initiative or referendum would have a severe and negative impact on minorities’ ability to participate in the polity, the court should employ strict scrutiny. But, where the measure has no such severe detrimental

⁵⁹⁷ See generally ISSACHAROFF ET AL., *supra* note 30, at 2 (arguing that the Constitution is concerned with democratic politics: “[T]hose who control existing arrangements have the capacity to shape, manipulate, and distort democratic processes . . . those who currently hold power will deploy that power to try to preserve their control. Thus, democratic politics constantly confronts the prospect of law being used to freeze existing political arrangements into place . . .”).

⁵⁹⁸ *Romer*, 517 U.S. at 634.

⁵⁹⁹ The doctrinal tool that the Court utilizes is not motive analysis. Here, calling attention to a disfavored status does not serve the function of requiring the judge to ferret out the bad motives or to “prove” prejudice. As already argued, such a doctrinal approach is inadvisable because it hinges on detecting prejudice in its “bewildering variety” and creates an administerability nightmare. See *supra* Part IV.C.2. It also misinterprets what is at stake.

⁶⁰⁰ See *Cleburne*, 473 U.S. at 446–47.

impact, it poses no problem under this analysis. Of necessity, this test requires that courts make substantive value judgments, as do all constitutional tests inevitably. However, it is asserted that courts have already been using such an analysis. By more explicitly examining potential impact in terms of these three aspects, courts can make their decisions both more coherent and also more just.

i. Political Participation

Some initiatives and referendums directly impact minorities' opportunity to participate politically in the polity. These are the measures that most overtly impinge on minorities' feeling that they are welcome members of the polity. These measures will also tend to stigmatize minorities and lead to their being deprived of civic benefits. Such measures must be viewed with the greatest skepticism.

Colorado's anti-gay rights Amendment 2, for example, directly precluded gay men and lesbians from using the legislative process to secure anti-discrimination legislation. As the Court emphasized in striking the provision, unlike any other group, homosexuals would have to obtain a constitutional amendment in order to secure such a protective law.⁶⁰¹ The Court states its concern clearly: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."⁶⁰²

Similarly, the measure challenged in *Hunter*⁶⁰³ directly proscribed racial minorities from securing beneficial housing legislation. In striking the measure, the Court stated that laws may "no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any

⁶⁰¹ See *Romer*, 517 U.S. at 631. The Court explains:

Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury.

Id. The Court also makes this point by highlighting that gay men and lesbians were not seeking "special rights" but privileges and protections enjoyed by the majority. See *id.* at 631; see also *supra* note 135 (Colorado Supreme Court addressing same issue).

⁶⁰² *Romer*, 517 U.S. at 633. Earlier in the opinion, the Court states: "Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class . . ." *Id.* at 624.

⁶⁰³ *Hunter v. Erickson*, 393 U.S. 385 (1969).

person's vote."⁶⁰⁴ It is significant, and not coincidental, that the Court cites to voting rights decisions in support of its decisions in both *Hunter* and *Romer*.⁶⁰⁵

Nor is it coincidental that the other two major decisions in which the Court has struck direct democracy measures also blocked minority access to the political process. In *Washington v. Seattle School District No. 1*,⁶⁰⁶ the Court struck an initiative that proscribed school boards from ordering busing. In *Reitman v. Mulkey*,⁶⁰⁷ although the Court did not emphasize the point, the stricken initiative prevented any state subdivision or agency from prohibiting housing discrimination. In *Seattle School District No. 1* and *Reitman*, the majority made its victory fairly permanent, emblazoning a political-ideological win into the state constitution and thus, placing out of bounds local forums where an unpopular cause might some day have an opportunity to prevail.

Some measures may directly target minorities' political participation without explicitly changing the voting process. English-only measures may have such an impact. Where an English-only law is interpreted to require people to communicate directly with their government only in English, such a provision will directly impede a language minority group's ability to participate in the polity or to influence governmental decisions, as the Arizona Court found in *Ruiz v. Hull*.⁶⁰⁸

⁶⁰⁴ *Id.* at 393; *see also id.* at 390 (emphasizing that "[t]he Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to § 137"). Professor Karlan's analysis underscores this point. *See* Pamela S. Karlan, *Just Politics? Five not so Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 297 (1997). *Cleburne*, although not a direct democracy case, can also be seen as a decision that emphasizes the need to examine with great care any measure that restricts a minority group's access to the political process. In that case, the Court recognized that the city council's alteration of the normal permitting process with respect to establishing a home for the mentally disabled was particularly onerous. *See Cleburne*, 473 U.S. at 448 ("May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?").

⁶⁰⁵ *See Romer*, 517 U.S. at 626; *Hunter*, 393 U.S. at 393; *see also* the voting rights cases *supra* notes 501, 506.

⁶⁰⁶ 458 U.S. 457, 462, 467–70 (citing *Hunter* and explaining that it is a violation of the Equal Protection Clause to structure the political process to burden a particular minority group).

⁶⁰⁷ 387 U.S. 369 (1967). The decision instead ruled the measure unconstitutional primarily because it placed the state's seal of approval on private discriminatory acts. *See id.* at 378–79; *see also supra* note 467.

⁶⁰⁸ *See supra* Part IV.C.5.b (discussing *Ruiz v. Hull* and use of languages other than English in communicating with state actors).

ii. *Stigmatic Harm*

Referendums and initiatives may also harm minorities with respect to their civil participation rights, albeit somewhat less directly, to the extent that they stigmatize⁶⁰⁹ those minority group members. Minorities who have been stigmatized may not literally be precluded from participating in the polity. However, stigmatization may indirectly have a negative effect on minority participation in two ways. First, stigma may alienate minority group members, causing them to feel as if it is no longer worth participating in the polity. As the Court famously recognized in *Brown v. Board of Education*,⁶¹⁰ the mere act of separating out members of one group may itself cause serious harm. When laws are used to create a legal class out of an unpopular group, the law becomes part of the majority's expression of hostility toward the minority group, making the harm that much more emphatic. Second, the stigmatization of minority groups through state laws may reinforce and encourage the majority to regard those members as non-equals, and even inferior to themselves.⁶¹¹ The harm is not just corruption of the democratic process; it is also the loss of minorities' continued meaningful participation in the polity.

The case of stigmatization is most clear where the referendum or initiative expressly selects out for special disfavored treatment an unpopular group, not a protected class, as is the case of gay men and lesbians. In these cases, the decisions have focused on the concept of stigmatization, although they have not necessarily used the word. In *Romer*, for example, the Court is clearly very troubled by the way Amendment 2 singles out and thereby stigmatizes gay men and lesbians. It makes the point repeatedly, stating for example, "Amendment 2, however, in making a general announcement that gay men and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."⁶¹² The Court emphasizes, as well, that the Amendment "identifies persons by a single trait and then denies them protection

⁶⁰⁹ I hesitate to use this term because it has become a fluid and undefined term of art. A future task may be to further develop what this concept means in the various contexts in which constitutional law applies it.

⁶¹⁰ 347 U.S. 483, 494 (1954) ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone.").

⁶¹¹ See MINOW, *supra* note 28, at 113 ("Does the act of naming or labeling cut off or deny relationships of mutual respect?"); Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 217–18 (arguing that the Court must ensure that the social identity of minorities is not so subordinated that co-equal co-participative dialogue cannot occur in the democratic polity).

⁶¹² *Romer v. Evans*, 517 U.S. 620, 635 (1996).

across the board.”⁶¹³ It states elsewhere that Amendment 2 “classifies homosexuals . . . to make them unequal to everyone else” and creates a class that is “a stranger to its laws.”⁶¹⁴ That is, the Court is concerned not only about the immediate political impact of the law on homosexuals, but also about the stigmatization effect of singling out gay men and lesbians for detrimental treatment.⁶¹⁵ It is not coincidental that the Court both opens⁶¹⁶ and ends⁶¹⁷ the *Romer* opinion with language and concepts that explicitly recall *Plessy v. Ferguson*, in which racial majorities used their political power to legitimize inequality of the crassest kind by enacting Jim Crow laws.

In other cases, the initiative or referendum is neutral on its face. There the court must make a determination whether the law is designed to impact on and treat a disfavored minority in a manner that might be stigmatic. These cases, such as *Reitman*, *Hunter*, and *Seattle School District No. 1*, are more difficult. As discussed in the prior Part, for the most part the Court’s analysis as to why these have a racial impact, or are a “de facto racial classification,” makes such a connection in a conclusory fashion.⁶¹⁸ However, once the connection is made, these cases address the stigma issue.⁶¹⁹ *Reitman v. Mulkey* makes the case clearly by focusing substantially on the fact that the adoption of the initiative would not only allow private discrimination, but would, in effect, place the state’s imprimatur on private discriminatory acts.⁶²⁰ In the Court’s view, the

⁶¹³ *Id.* at 633.

⁶¹⁴ *Id.* at 635; *see also id.* at 633 (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.” (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980))).

⁶¹⁵ This is Professor Schacter’s argument as well. *See Schacter, Romer and Democracy*, *supra* note 30, at 400–01.

⁶¹⁶ *See Romer*, 517 U.S. at 623 (“One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

⁶¹⁷ *See id.* at 635 (“Colorado cannot . . . so deem a class of persons a stranger to its laws.”).

⁶¹⁸ *See supra* notes 400–02, 406–10, 450–55 and accompanying text (circular reasoning in *Hunter*’s, *Seattle*’s, and *Reitman*’s racial impact analysis).

⁶¹⁹ They do so in conclusory fashion by taking as a fact that anti-housing and anti-busing initiatives deeply impact racial minorities. *See supra* notes 397–98, 447 and accompanying text.

⁶²⁰ *See Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (“Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.”); *see also id.* at 378–79 (“[T]he provision would involve the State in private racial

state involvement was significant and unconstitutional not only because it would make the discrimination difficult to challenge, but also because it would encourage other acts of discrimination: "Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discrimination."⁶²¹ By officially allowing private actors to discriminate on the basis of race, the amendment would clarify and emphasize that African Americans are non-privileged and lesser members of society.

By focusing on stigma, the Court must articulate what it is about the initiative or referendum that leads the Court to conclude that there is a connection between the challenged act and a minority group. The relationship must be close to rise to the level of stigma. In the case of fair housing and busing initiatives, the Court could look at how the controversy of the campaign played out, what the proponents said, and, in modern day contexts, what images the media campaign communicated to majorities.⁶²² Did these seek to stigmatize? Second, the Court focuses on impacts: Does the initiative or referendum impact on an important aspect of the minority's citizenship and interests within the polity and separate them out and legitimize stigmatic treatment by majorities? This inquiry does not locate "bad motives" but asks whether the initiative is being framed as a we-they schism that underscores that the purpose of the "neutral" initiative is to "fence" out a minority. Thus, this proposed stigma inquiry is more workable and more readily identifiable than improper intent.⁶²³ Nonetheless, it remains a difficult inquiry because the Court must be able to convincingly make that link.

This analysis makes more sense of the Court's distinctions between the initiatives considered in *Valtierra* and *City of Eastlake*, which were upheld, and those struck down in *Hunter* and *Reitman*.⁶²⁴ As discussed earlier, although all of the initiatives had a negative impact on minorities, the Court chose to strike only the set that it viewed as more blatantly and directly discriminatory—the anti-fair housing and the anti-busing measures.⁶²⁵ Those that had more indirect

discriminations to an unconstitutional degree.").

⁶²¹ *Id.* at 381.

⁶²² See *supra* Part III.C.2.

⁶²³ Both *Romer* and *Cleburne* focus in part on whether the laws in question were enacted to express what *Romer* calls "animus" and *Cleburne* calls "irrational prejudice." See *Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–46 (1988); see also *supra* notes 429–33 (discussing *Reitman*'s and *Hunter*'s findings of racial discriminatory intent as indicative of the Court having found racial wrongs).

⁶²⁴ See *supra* Part IV.C.2, Part IV.C.3.

⁶²⁵ See *supra* text and notes at p. 491.

effects, *Valtierra* and *City of Eastlake*, were upheld. Thus, to the extent that stigma itself is a harm, a result that provides constitutional remedies for cases where there is a more direct link may be more satisfactory in terms of the values championed by this proposed test.⁶²⁶ A referendum that is overtly and blatantly harmful to a minority group will have an even greater negative impact on the minority group members' political participation than will a referendum with a similar impact, but more subtle in its linkage to stigmatization.⁶²⁷

iii. *Civil Society Detriment*

The third factor courts should consider in deciding whether an initiative or referendum unduly burdens a minority group's civil participation rights is how that measure impacts upon minority group members' day-to-day participation in civil society. Of the three, this is by far the most open-ended factor. It covers potential impacts on the lives of minority group members, including, for example, impacts on economic welfare, speech, and physical or psychological well-being. According to the theory of equal protection set out in this Article, the impacts in these areas are relevant not because minority group members have entitlement to certain minimum benefits. Rather, inflicting harsh civil society detriments on minorities can limit, or be a proxy for, minorities' ability to participate in the polity.

In several of the direct democracy cases, the Court has looked at whether the challenged measure would adversely impact minorities with respect to their benefits as a participant in civic society. The *Romer* decision, in particular, emphasizes that Amendment 2 "identifies persons by a single trait and then denies them protection across the board."⁶²⁸ The Court strikes the measure, in part, because the majority "imposes a special disability upon those persons alone," and takes away "protections taken for granted by most people either

⁶²⁶ Under this test, *Valtierra* and *City of Eastlake* could be closer cases and would come out differently if the Court had found that the measures would harm minority's participation rights. Arguably, a measure need not be blatant to have a negative stigmatizing impact. To the extent that members of the community saw the purportedly neutral zoning measures as geared toward minority group members, a stigmatizing impact that is exclusionary might occur. The question, then, would have been for the Court to determine whether there is a close enough relation between the stigmata of physical and membership exclusion and the affected group's participation.

⁶²⁷ What militates in favor of an approach that requires more directness in the linkage between a majority enacted referendum or initiative and stigmata is that this would largely reflect the current constitutional approach to racial discrimination in equal protection cases. Moreover, a more direct link also makes the Court's remedial action easier to justify to the majority and threatens less the Court's anti-majoritarian hubris.

⁶²⁸ *Romer v. Evans*, 517 U.S. 620, 635 (1996); see also *id.* at 634.

because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”⁶²⁹ Amendment 2 takes away from gay men and lesbians safeguards and protections against the kinds of discriminations that affect livelihood (discrimination on the job) and that can also be publicly humiliating (being denied service or entry for being a homosexual).⁶³⁰ That is, the majority acted unconstitutionally because it used its dominant position in the political process to deprive minority group members of certain minimum components of civic life while keeping such benefits for themselves.

In *Hunter*, as well, the Court emphasizes that the majority’s action would be harmful to the minority in terms of its day-to-day civic life. Specifically, the majority was taking away from minorities the right not to be discriminated against by race in housing transactions. Prior case law, including *Reitman* and *Shelley v. Kraemer*, had established why this kind of discrimination is harmful to minorities. *Cleburne*, while not a direct democracy case, reflects a concern that imposing a special permit requirement that excludes mentally disabled persons from sharing as co-equals would lead to the “exclusion and isolation in a community” of an already highly stigmatized group.⁶³¹

The relationship between the first two factors—exclusion from participation and stigma—and diminished political participation is much more direct than is the link between depriving a minority group civic benefits and diminished political participation. Thus, it is not surprising that the Court has proved reluctant to strike those direct democracy measures which, while causing some deprivation of civic benefits, do not, at least on their face, decrease minority participation in the polity. *Valtierra* and *City of Eastlake* are such cases. By passing the zoning legislation at issue in those cases, the majority deprived a minority group of a significant economic and associative benefit. Yet, such losses may not have been sufficiently severe to cause the minority group members to be alienated from the polity; nor would the loss have necessarily encouraged majority group members to exclude the minority from political participation.

⁶²⁹ *Id.* at 634. Professor Karlan notes that this language tracks *Hunter*’s admonition that majorities cannot create electoral obstacles and “place special burdens on minorities . . . [when] the majority needs no protection against [such] discrimination.” Karlan, *supra* note 604, at 298.

⁶³⁰ See *Romer*, 517 U.S. at 636 (describing the Boulder and Denver ordinances).

⁶³¹ This is Professor Minow’s social relations analysis of *Cleburne*. See MINOW, *supra* note 28, at 114–20.

2. *Can the Initiative Withstand Strict Scrutiny?*

Where, having considered each of the three factors outlined above, a court concludes that an initiative or referendum would severely and detrimentally impact a minority group's participation in the polity, a court must use a strict scrutiny analysis to determine whether the measure should be stricken.⁶³² If the supporters of the measure can show that the measure is necessary to serve a compelling governmental interest, then it should be upheld, notwithstanding its negative impact. But where, as will generally be the case, the strict scrutiny test cannot be met, the measure must be stricken.

Some will likely object that this test is too strict and that the public should be given more leave to legislate through the initiative process. However, such strict review is necessary to protect the participation rights of *all* members of the polity. More importantly, this is the test which the Court has—in fact, but not in words—employed.

3. *Application of Analysis to Previously Decided Cases*

The results achieved in the Court's direct democracy decisions, which initially appeared to be a doctrinal jumble, actually cohere when analyzed under the test that has been set forth above. Colorado's Amendment 2, struck by the Court in *Romer*, caused harm in all three areas by denying gay men and lesbians access to the political process, stigmatizing them, and also denying them civic benefits in multiple areas.⁶³³ Similarly, the anti-fair housing measure that the Court struck in *Hunter* denied racial minorities access to the political process, stigmatized those groups by legitimizing private discrimination, and also caused economic harm to the minorities by allowing their exclusion from certain neighborhoods.⁶³⁴ *Reitman*'s anti-fair housing measure denied minorities access

⁶³² The strict scrutiny advocated here is that which the Court has generally employed in reviewing measures that impinge on fundamental rights or intentionally harm members of a suspect class. See *supra* notes 474, 476–78.

⁶³³ See *supra* notes 598–99, 612–17 and accompanying text.

⁶³⁴ The Court found that the Akron City ordinance was barred by the Equal Protection Clause because it selected out a law that had racial impact (fair housing) to impose a “special burden on racial minorities.” *Reitman v. Mulkey*, 393 U.S. 369, 391 (1967). By imposing an automatic referendum requirement only with respect to fair housing laws, majorities had structured the political process to advantage their position and their views. Because they would continue to be a political majority, the automatic referendum process enabled majorities to manipulate and control the local democratic process and thus ensure that racial ordering in private housing would continue as per the majorities' cultural-ideological views, which imposed on racial minorities an inferior citizenship and status. This is what the *Hunter* Court meant when it stated that “majorit[ies] need no protection against discrimination and if [they]

to the political process by blocking state subdivisions and agencies from prohibiting housing discrimination and also stigmatizing the minorities and causing a serious economic detriment.⁶³⁵ Finally, the anti-busing measure struck by the Court in *Washington v. Seattle School District No. 1*⁶³⁶ deprived a minority group of access to the process by preventing local school boards from using busing to counteract racial imbalances. In so denying minorities' access, the anti-busing measure also had a stigmatizing impact,⁶³⁷ and it further led to minorities being denied educational benefits.⁶³⁸

By contrast, in those decisions where it refused to strike democratic initiatives and referendums, the Court used the three factors to justify its results. Although we may not necessarily agree with the way the Court conducted its analyses, at least its decisions become more comprehensible. The Court explained its refusal to strike the anti-busing measure at issue in *Crawford v. Los Angeles Board of Education*⁶³⁹ by emphasizing that the measure did not impede minorities' political access to school boards, but rather merely restricted courts' ability to provide certain relief. That is, it found the measure did not overtly restrict political access.⁶⁴⁰ Furthermore, the Court effectively found the anti-busing provision was not stigmatizing, in that it neither overtly nor indirectly was geared to harm minorities.⁶⁴¹ Finally, the measure purportedly denied minorities no significant benefit in that it did not deprive them of access to the *Brown* remedy.

The Court's two decisions affirming zoning measures enacted through direct

did, a referendum might be bothersome but no more than that." *Id.*; see also Karlan, *supra* note 604, at 298-99 (making a similar point).

⁶³⁵ In *Reitman*, the Court relies on the California Supreme Court's determination that the intent of the constitutional amendment initiative was to authorize racial discrimination in the private market. See *Reitman*, 387 U.S. at 376 ("[T]he court assessed the ultimate impact . . . and concluded that the section would encourage and significantly involve the State in private racial discrimination . . ."). It also relied on the lower court's conclusion that state action should not endorse such discrimination already barred by *Shelley v. Kraemer*. See *id.* at 381 ("The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.").

⁶³⁶ 458 U.S. 457, 470 (1982) (striking provision because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities").

⁶³⁷ See *id.* at 471 (noting undoubted racial nature of measure).

⁶³⁸ See *id.* at 472 (observing that desegregation of the public schools "inures primarily to the benefit of the minority").

⁶³⁹ 458 U.S. 527 (1982).

⁶⁴⁰ See *id.* at 536 n.12 (distinguishing *Seattle School District No. 1*).

⁶⁴¹ See *id.* at 537-38 (distinguishing *Hunter*).

democracy, *City of Eastlake* and *Valtierra*, both suggest that the measures were acceptable because they did not deprive minorities of access to the political process,⁶⁴² did not stigmatize minorities,⁶⁴³ and did not cause a significant economic or other detriment to a cognizable minority.⁶⁴⁴

C. Application to Current Controversies

We are now in a position to apply the analysis and theory that this Article has developed to some of the important current controversies. Of course, with limited space and without complete evidence, this Part will only sketch out the framework of these analyses.

1. *Anti-Gay Civil Rights: Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*

In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,⁶⁴⁵ notwithstanding the Supreme Court's decision in *Romer*, the Sixth Circuit upheld a Cincinnati referendum that repealed that city's equal opportunity ordinance and provided that "no special class status may be granted based upon sexual orientation, conduct or relationships."⁶⁴⁶ Applying the analysis advocated here, the decision is wrong. The measure directly denied a minority group, gay men and lesbians, access to the political process by making it more difficult to secure legislation proscribing anti-gay discrimination than to obtain any other legislation.⁶⁴⁷ In denying such access the measure also stigmatized gay men and

⁶⁴² See *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 677–78 (1975) (finding no deprivation of political access because the people may choose to legislate through direct democracy); *James v. Valterra*, 402 U.S. 137, 140 (1970) (stating that the present measure, unlike the referendum at issue in *Hunter*, did not deny minorities access to the governmental process).

⁶⁴³ See *Valtierra*, 402 U.S. at 141 (rejecting proposition that measure targets racial minority). *City of Eastlake* does not even consider whether the measure would have a stigmatizing impact on minorities.

⁶⁴⁴ *Valtierra* concluded that plaintiffs had failed to show adverse impact on racial minorities. See *id.* at 141. Neither *Valtierra* nor *City of Eastlake* even considered whether the measures at issue would have an adverse economic impact on non-racial minorities.

⁶⁴⁵ 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

⁶⁴⁶ *Id.* at 291 (quoting Issue 3, which was enacted by 62% of the ballots cast).

⁶⁴⁷ The mere fact that, as the Sixth Circuit emphasized, gay men and lesbians would not need to convince voters statewide but only those within the city of the validity of their cause does not ameliorate the severe damage caused by such a measure. The ordinance explicitly and directly denies gay men and lesbians access to the political process that majorities enjoy. Moreover, depending on the voters, it may be more difficult to win a city election than to win a

lesbians, which the *Romer* Court expressed by using *Plessy v. Ferguson* to allude to creation of a separate caste-like group.⁶⁴⁸ In addition, by legitimizing anti-gay discrimination, the measure will potentially have a serious detrimental impact on the daily lives of gay men and lesbians. Given all of these impacts, a strict scrutiny analysis must be employed. As the Supreme Court found in *Evans v. Romer*,⁶⁴⁹ it is difficult to find a rational basis, much less a compelling governmental interest, to support such a measure.

2. English-Only: *Ruiz v. Hull*

In *Ruiz v. Hull*,⁶⁵⁰ the Arizona Supreme Court struck down Arizona's English-only state constitutional amendment. This case was rightly decided for the following reasons.

The first part of the test we have developed is rather easily met. The English-only initiative allowed the monocultural and monolingual majority to vote on the content of minorities' citizenship in a way that would affect only these minorities. In this case, minorities were those persons who were either bilingual or non-English speakers. What is at play here is that a dominant Anglo-American ideology, which holds that to be a member of the polity one must be an English speaker, is being imposed on all members of the polity. Its effect is to exclude non-English speakers, most immediately, and to reject symbolically, and burden in practice, those who are multicultural and bilingual from the polity.

The argument could also be made that this minority group is a racialized class in Arizona, given that state's past racial history.⁶⁵¹ This analysis is not necessary to the test outlined here. Nor should it be, because even performing such an analysis would exacerbate underlying tensions. Thus, it is significant and commendable that the *Ruiz v. Hull* Court does not do any racial intent analysis and does not address this dispute as if it were a race issue.

The more difficult inquiry is whether the enactment of the English-only provision deprived the minority of participation rights in the polity. Unlike many of the initiatives, Arizona's constitutional amendment did not overtly prevent a minority group from obtaining access to the political process. The question of whether the English-only amendment should be seen as blocking political access, therefore, depends on the extent to which taking away the ability of cultural and language minority members to express themselves in their own language in the public sphere creates a separate class that undermines basic citizenship rights.

statewide election.

⁶⁴⁸ See *supra* notes 601–02, 612–17 and accompanying text.

⁶⁴⁹ 517 U.S. 620 (1996).

⁶⁵⁰ 957 P.2d 984 (Ariz. 1998).

⁶⁵¹ See *supra* note 169.

Looking at political access, stigma, and civic rights, the answer would seem to be "yes."

As the Arizona Supreme Court found, the measure denies the affected minority group members the opportunity to provide information to, and receive information from, their government. Although placing its analysis under the First Amendment, rather than the Equal Protection Clause, the court nonetheless provides essentially the same reasoning that has been offered here, emphasizing that both limited and non-English speakers would be deprived of their right to participate in the political process:

By denying persons who are limited in English proficiency, or entirely lacking in it, the right to participate equally in the political process, the Amendment violates the constitutional right to participate in and have access to government, a right which is one of the "fundamental principle[s] of representative government in this country."⁶⁵²

In terms of stigma, the effect of the ordinance is also apparent. By singling out a particular group and proscribing them from speaking in their chosen language, the measure implies that speaking in any language other than English is inappropriate. Perhaps those who do not speak English are *de facto* non-citizens; or implicit in their inability to speak English is disloyalty; perhaps they are unintelligent; perhaps they are conspiring against or talking about the Anglo majority. Whatever the rationale, non-English speakers have clearly been cast in a negative light that fences them out from civic life.

In addition, the Amendment will certainly have a negative impact on the day-to-day life of many Arizonans. First and most directly, the measure will prevent such persons from expressing themselves in their chosen language, thereby denying such minority group members the opportunity to enjoy unimpeded free expression.⁶⁵³ Second, the stark and bitter reality is that some persons who are not fluent in English will find themselves gravely disadvantaged when they attempt to deal with the government in terms of a vast array of benefits and burdens. Licenses, welfare, medical benefits, schooling, and other benefits will all be less accessible.⁶⁵⁴

Finally, the English-only amendment is not necessary to serve a compelling state interest. As the Arizona Supreme Court found, even assuming that the statute's goal of promoting English as a common language is "compelling," such

⁶⁵² *Ruiz*, 957 P.2d at 997 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)).

⁶⁵³ *See id.* (making same point).

⁶⁵⁴ The *Yñiguez* lower court litigation makes this point directly. *See Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated on remand*, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997); *see also supra* note 153.

a goal "does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages by state and local governments."⁶⁵⁵

3. *Bilingual Education: Valeria G. v. Wilson*

California's recently enacted anti-bilingual education measure, Proposition 227, appears to violate the Equal Protection Clause. This measure, currently being challenged in *Valeria G. v. Wilson*,⁶⁵⁶ "amends the California Education Code to change the system under which students who are limited in English proficiency are educated in California's public schools."⁶⁵⁷ In particular, it replaces a system of bilingual education whereby students may continue to receive instruction in various academic subjects such as math and science in their "primary" or "home" language with a curriculum that provides English immersion for a period not normally to exceed one year.⁶⁵⁸ However, and most significantly, the measure not only changes the Education Code but also limits language minority's political access to further influence this important debate. Section 335 provides that the provisions of the new Act may be amended only "upon approval by the electorate or by a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor."⁶⁵⁹

As with the English-only measure, Proposition 227 affects a "minority" group as defined in this Article. Thus, the parts that follow will address whether this measure impinges on citizenship and whether it would pass strict scrutiny review.

With respect to the first factor for assessing citizenship impact, limiting access to the political process, Proposition 227 is quite problematic. The Act explicitly provides for amendment only by winning a future statewide referendum or by securing votes of two-thirds of the legislature. Although rejecting the motion for a preliminary injunction, the district court noted: "Proposition 227 goes further than most legislation which has reached the courts"⁶⁶⁰ By requiring those who seek to restore bilingual education to

⁶⁵⁵ Ruiz, 957 P.2d at 1001; see also *Yñiguez*, 69 F.3d at 944-47 (analyzing same issue using *Meyer* and *Tokushige*); *supra* note 513.

⁶⁵⁶ 12 F. Supp.2d 1007 (N.D. Cal. 1998) (refusing to grant motion for preliminary injunction barring implementation of Proposition 227).

⁶⁵⁷ *Id.* at 1012.

⁶⁵⁸ See *id.*

⁶⁵⁹ See *id.* at 1014 (quoting Proposition 227, § 335).

⁶⁶⁰ *Id.* at 1024. Citing the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 706-08 (9th Cir. 1997), the district court rejected plaintiffs' argument,

jump political hurdles that would not normally apply, the Act directly blocks the minority group's access to the political system. As the Court has found in *Romer*, *Hunter*, and *Seattle School District No. 1*, such measures are highly suspect because they "lock in" a majority win.

Turning to stigma, the argument is somewhat closer. Many might argue that the Act does not stigmatize anyone but merely imposes one particular educational policy rather than another.⁶⁶¹ If the measure were limited to revising educational policy, this argument would be powerful. However, like the English-only measure discussed above, Proposition 227 stigmatizes language minorities by the very imposition of Section 335, blocking political access. In addition, like the Supreme Court's decisions in *Meyer v. Nebraska*⁶⁶² and *Farrington v. Tokushige*,⁶⁶³ this policy purports to be regulatory and further American unity. *Meyer* and *Tokushige* could be interpreted to require scrutiny of language regulations where the Court finds that the majority is attempting to mandate assimilation by unduly coercive and stigmatic methods.⁶⁶⁴ These regulations imply that only by coercing assimilation can such minorities be trusted to become American citizens.

Finally, the question of whether Proposition 227 detrimentally affects the affected minority group's civic life depends on the interpretation of educational evidence. Opponents of the measure have argued that the new Act is educationally unsound and have provided expert testimony showing that the elimination of bilingual education will deny minority students access to large parts of the substantive curriculum.⁶⁶⁵ If true, the measure could ultimately affect political access by tracking such minorities into low-paying, dead-end jobs, thereby alienating them from the polity. However, those advocating Proposition 227 have presented their own expert testimony showing that the immersion

which cited *Hunter*, that the denial of political access amounted to a violation of the Equal Protection Clause. See *Valeria G.*, 12 F. Supp.2d at 1024. The district court also sought to minimize the burden on political access, suggesting that those unhappy with the educational policy could petition their local school boards or even the state school board for exceptions to the Act. See *id.* at 1025.

⁶⁶¹ The district court emphasized, in denying the motion for a preliminary injunction, that it could not "discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group." *Valeria G.*, 12 F. Supp.2d at 1014.

⁶⁶² 262 U.S. 390 (1923).

⁶⁶³ 273 U.S. 284 (1927).

⁶⁶⁴ This interpretation of these cases was put forward by the Ninth Circuit. See *Yñiguez v. Arizonans for Official English*, 69 F.3d 920, 944-47 (9th Cir. 1995); see also *supra* notes 512-14 and accompanying text. The Ninth Circuit's decision is only persuasive authority because it was rendered moot by the Supreme Court. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

⁶⁶⁵ See *Valeria G.*, 12 F. Supp.2d at 1019.

approach is sound and, instead, that bilingual education itself is a curriculum that tracks language minorities, in particular Latinos, into a less rigorous substantive curriculum that leads to their underachievement.⁶⁶⁶ In fact, it can be argued that mainstreaming minorities into regular classes is essential to allow them to obtain a good education and become fully participating members of the polity. This dispute cannot be resolved in the abstract, but only by close examination of the evidence.

Assuming that the evidence shows that Proposition 227 seriously and adversely impacts a language minority's political participation, then a court should perform a strict scrutiny review. In defense of this Act, the state would contend that it has a compelling educational and financial interest in sharply curtailing bilingual education and streamlining educational methods. Here, too, the success of such an argument would depend upon the availability and strength of empirical data and testimony regarding educational policy and alternative options. The state would be unable to meet the tough strict scrutiny test if, as suggested, *Meyer* and *Tokushige* are interpreted to grant language minorities who are singled out for stigmatizing and unequal treatment greater civic protection.

4. *Illegal Immigration: LULAC v. Wilson*

As discussed in Part III.B.2.d, California's Proposition 187 aimed to prevent those persons lacking proper citizenship or residency status from obtaining public social services or from enrolling their children in public school. The measure also required public officials and schoolteachers to report individuals suspected of lacking proper citizenship or residency documentation. A federal district court has already largely invalidated the Proposition on the grounds that federal law preempted it.⁶⁶⁷ This Part will examine whether the measure could also have been invalidated under the proposed analysis.⁶⁶⁸

As will be shown, the analysis raises but does not answer some challenging questions relating to whether persons who, by definition, are not officially members of the polity, have any kind of right to participate in that polity. Certainly it can be argued that because such persons by law have no right to participate in the political process of this country, any measure that impedes their participation is legitimate. Such an argument can only be defeated by showing

⁶⁶⁶ See *id.*

⁶⁶⁷ See *League of United Latin Am. Citizens v. Wilson (LULAC)*, Nos. 94-7569 MRP, 94-7652 MRP, 94-7570 MRP, 95-0187 MRP, 94-7571 MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). Currently, this case has been referred to mediation. See *supra* note 223.

⁶⁶⁸ Plaintiffs only challenged the measure on preemption grounds. See *LULAC*, 908 F. Supp. at 764.

that persons who have no legitimate status are nonetheless in some broader sense members of the polity; that because such persons may in the future gain legitimate status, it is wrong to currently impede their participation; or that the measure directed to those lacking status will have spillover effects and impede the participation of those who are members of the polity.⁶⁶⁹

Proposition 187 clearly had an adverse effect on a minority group. Although the Supreme Court, in *Plyler v. Doe*,⁶⁷⁰ refused to find that aliens are a “suspect class,” it did conclude that they are persons entitled to protection under the Equal Protection Clause.⁶⁷¹

Proposition 187 did not explicitly limit any minority’s access to the political process. Moreover, even if it did limit access, perhaps such a limit would not be problematic as applied to persons who are neither citizens nor legal residents. This issue again revolves around resolving membership in the polity.

The question of stigma is also interesting. It seems clear that the Act does stigmatize illegal immigrants both by denying them benefits that are provided to others and also by requiring officials to report the presence of persons who seem to lack legal status. By such differential treatment and by mandating such reporting, Proposition 187 requires public officials and teachers to engage in “we-they” thinking. It also reinforces the sentiment that illegal immigrants’ presence within the geographical polity is wrong and that they should be separated out from the rightful members of the polity. Moreover, the very public differential treatment of these minorities, which research has shown are among the most disliked persons in our society,⁶⁷² seems to invite stigmatic treatment. The reporting requirement is particularly troubling because in order to discern who might be “illegal” such officials would have to look for indicia of difference. This encourages highlighting physical differences, as well as racial thinking. However, all these questions turn on whether, as noted above, it is legitimate to stigmatize those who are not officially members of the polity but who share the polity’s geographic space.

Third, it is clear that Proposition 187 was designed to have a devastating

⁶⁶⁹ *Plyler v. Doe* founded its conclusion that undocumented children are nonetheless entitled to education on several of these arguments. See, e.g., 457 U.S. 202, 222 n.20 (1981) (stating that many non-citizen children will remain in the country permanently, that some will become citizens, and that non-citizens may sometimes play important and even leadership roles in the community); see also *supra* Part III.B.2.d.v; *supra* note 256 (describing the important spillover effects Proposition 187 may have on persons who are citizens or legal residents but who may physically resemble those who are suspected of being here illegally).

⁶⁷⁰ 457 U.S. at 223.

⁶⁷¹ See *id.* at 210–12 (concluding that denial of public education to undocumented children had no rational basis and therefore violated the Equal Protection Clause).

⁶⁷² See *supra* note 148 and accompanying text (reporting on political science research).

impact on the civic life of illegal immigrants by denying them a broad array of governmental benefits and education, and also by subjecting them to heightened investigation. Certainly such a measure would discourage illegal immigrants from participating actively in the polity. However, the question remains whether or not it is wrong to impose such a burden on persons who have no legitimate status in the polity.

Finally, if Proposition 187 were found to impermissibly burden participation rights, a court would have to determine whether the government's arguably compelling interest in limiting resources to legitimate citizens and residents could be accomplished in a less burdensome manner.

Thus, the proposed analysis must propose many difficult questions that are unsettled in our jurisprudence. It is not surprising that the district court elected to enjoin Proposition 187 on better established doctrinal grounds—federal preemption.⁶⁷³

5. *Affirmative Action*: Coalition for Economic Equity v. Wilson

California's so-called Civil Rights Initiative, also known as Proposition 209, is deceptively simple.⁶⁷⁴ In relevant part, it states:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.⁶⁷⁵

Although a district court granted a preliminary injunction enjoining implementation of the Proposition on equal protection grounds,⁶⁷⁶ the Ninth Circuit subsequently reversed the grant of the injunction and held that the provision did not violate the Equal Protection Clause.⁶⁷⁷

It seems relatively clear that Proposition 209 is geared to affect minority

⁶⁷³ See *supra* note 667 and accompanying text.

⁶⁷⁴ Commentator Girardeau Spann has called Proposition 209 "alluring and seductive." See Spann, *supra* note 263, at 187.

⁶⁷⁵ CAL. CONST. art. 1, § 31(a).

⁶⁷⁶ See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996).

⁶⁷⁷ See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). A recent Superior Court decision has determined that California's legislatively enacted set-aside minority contract programs and affirmative action programs mandated for community college districts do not violate the Equal Protection Clause because they are "nonpreferential outreach and recruitment" and do not discriminate against majority members. See *Wilson v. Nussbaum*, No. 96CS01082, slip op. at 18 (Sup. Ct. Sacramento, Nov. 30, 1998).

groups. All would agree that its impact, although couched in neutral terms, will be to sharply curtail affirmative action intended by its authors to benefit various groups defined by race, sex, color, ethnicity, or national origin.⁶⁷⁸ The Ninth Circuit questioned whether Proposition 209 affects minorities, observing that, counted together, women and minorities make up a majority of the electorate,⁶⁷⁹ but ultimately the panel accepted the district court's finding that Proposition 209 burdens members of insular minority groups.⁶⁸⁰

The somewhat more difficult question is whether Proposition 209 impinges on the affected minority's political participation. Opponents of the measure argued that it explicitly restructured the political process in a non-neutral manner, erecting "unique political hurdles only for those seeking legislation intended to benefit women and minorities—who must now obtain a constitutional amendment—while allowing those seeking preferential legislation on any other ground unimpeded access to the political process at all levels."⁶⁸¹ The district court accepted this argument, concluding that, by requiring affirmative action advocates to either secure passage of a pro-affirmative action constitutional amendment or obtain two-thirds approval of both legislative houses, the Proposition would put such advocates to great expense and effort, thereby effectively precluding them from petitioning local and state policymakers.⁶⁸² The Ninth Circuit, by contrast, found no improper burdening of the political process, suggesting that the state should have the power to generally bar racial discrimination or preferences at the highest level,⁶⁸³ that in any event the measure did not deny a right to equal treatment,⁶⁸⁴ and that states are generally free to decide which level of government should make various decisions.⁶⁸⁵

⁶⁷⁸ See *Coalition for Econ. Equity*, 946 F. Supp. at 1493 (quoting official description of measure explaining purpose of eliminating affirmative action favoring women and minorities).

⁶⁷⁹ See *Coalition for Econ. Equity*, 122 F.3d at 704 ("Can a statewide ballot initiative deny equal protection to members of a group that constitutes a majority of the electorate that enacted it?"); see also *id.* at 705 n.13 (stating that women, as a majority of the population, likely are not entitled to protection under the *Hunter* line of cases).

⁶⁸⁰ See *id.* at 704. This is the correct interpretation of "minorities" under the proposed test because the concern of the analysis is with dynamics of prejudice and stigmatization that are superimposed on democratic processes. Such dynamics exist because a minority group has, for historical and social reasons, a subordinate social identity. See *supra* note 14 (defining minorities as a group that, for social identity purposes, is subordinate to the majority and which numerically could be greater in numbers than majorities).

⁶⁸¹ *Coalition for Econ. Equity*, 946 F. Supp. at 1489 (characterizing plaintiffs' argument).

⁶⁸² See *id.* at 1498–1510 (emphasizing that the measure is unconstitutional because it impermissibly restructures political process in a non-neutral manner).

⁶⁸³ See *Coalition for Econ. Equity*, 122 F.3d at 706.

⁶⁸⁴ See *id.* at 707.

⁶⁸⁵ See *id.* at 708.

However, the Ninth Circuit seems to miss the main thrust of the *Hunter/Romer* line of cases, which is that a majority cannot unfairly and unequally burden minorities' access to the political process.⁶⁸⁶

With regard to stigma, the effects of Proposition 209 are less obvious. On its face, the measure does not stigmatize minorities. In fact, its supporters would argue that one of the purposes of the measure is to eliminate the stigma supposedly created when affirmative action programs permit people to say that minorities did not get where they are based on merit.⁶⁸⁷ On the other hand, the argument could be made that Proposition 209 elects and institutes a political as well as epistemological position that discredits racial minorities' strongly held viewpoint that to be able to compete on meritocratic principles affirmative action is needed to overcome barriers to access imposed by whites' unconscious discrimination.⁶⁸⁸ However, this latter counterpoint may prove too much and passes the line between what is political and subject to legitimate debate, as opposed to what discredits minorities' beliefs and is therefore "stigmatizing." It could well be argued that "stigma" should require a stronger social effect than one that reflects a different epistemological vision.⁶⁸⁹ The better argument is one already set forth—that Proposition 209, in requiring amendment to the state constitution to change this pro-majority outcome, implies that the minorities cannot be trusted to play by the normal rules. Moreover, majorities have used their ability to effect an electoral "win" to freeze out future debate on such an important and critical issue to minorities and the polity as a whole.⁶⁹⁰

⁶⁸⁶ See *id.* at 711 (Schroeder, Pregerson, Norris & Tashima, JJ., dissenting from denial of petition for *rehearing en banc*) ("The Supreme Court has squarely held that a state violates the Constitution when it attempts to put legislative remedies which benefit minorities at a remote level of government beyond the ordinary legislative process.").

⁶⁸⁷ Cf. *Adarand Constructors v. Peña*, 515 U.S. 200, 229–30 (1995) ("[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

⁶⁸⁸ See discussion *supra* notes 275–80 and accompanying text.

⁶⁸⁹ In *Democracy and Inclusion*, I argue that it is inappropriate for courts to choose between differing epistemological visions of social phenomenon, such as discrimination, which is at the core of the affirmative action debate between majorities and minorities. I argue that *Adarand* is a wrongly reasoned case because it chooses, albeit implicitly, a vision of discrimination based on a white majority perspective. See Lazos Vargas, *Democracy and Inclusion*, *supra* note 17, at 252–64. Therefore, I do not favor a conceptualization of stigmatization that shoehorns into that concept racial minorities' perspective of racial discrimination.

⁶⁹⁰ The California Ballot Pamphlet contained partisan arguments both supporting and opposing Proposition 209. One of the arguments in favor of the Proposition puts the point baldly: "A generation ago, we did it right. We passed civil rights laws to prohibit

Finally, Proposition 209 will potentially have a powerful impact on many aspects of civil life. As the district court's decision outlines, it eliminates affirmative action in such areas as government contracting, employment, and education.⁶⁹¹ Although the Ninth Circuit characterized the loss of such a preference as "inscrutable," in that there is no constitutional right to preferential treatment solely on the basis of race or gender,⁶⁹² such a position is open to debate. Certainly those persons who are now denied access to contracts, employment, or school will suffer a real civic and economic loss. From their position, affirmative action is not a "preference" but a counteraction to discriminatory barriers to access.⁶⁹³

If Proposition 209 were found to seriously and adversely impact minorities' political participation, it could be upheld only if the measure was necessary to serve a compelling government interest. The district court found that the measure did not even survive intermediate scrutiny, stating that, assuming for argument's sake that the state is justified in ending discrimination, it has not offered any justification for reordering the political process to the detriment of minorities' interest.⁶⁹⁴ In truth, it is quite hard to imagine when such justification might exist.

VI. CONCLUSION

Majority-minority conflict is the issue of our day. This issue is magnified when initiatives and referendums allow majorities to vote directly on minorities' democratic citizenship. Courts must employ equal protection concepts to fulfill their responsibility in a democratic polity—to structure disagreements so that majorities and minorities will continue to co-exist in ways that do not violate our constitutional values. The test proposed here not only protects minorities' rights, but also better articulates what courts are doing in their analyses and why certain

discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides." *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1494 (N.D. Cal. 1996).

⁶⁹¹ *See id.*

⁶⁹² *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 704 (9th Cir. 1997).

⁶⁹³ The Sacramento Superior Court makes this specific finding in the context of California's set-aside minority contract programs and affirmative action programs mandated for community college districts. *See Wilson v. Nussbaum*, No. 96CS01082, slip op. at 18–20 (Sup. Ct. Sacramento, Nov. 30, 1998). *See generally McGinley, supra* note 278 (arguing that affirmative action is a remedy for ongoing transactional unconscious discrimination against minorities).

⁶⁹⁴ *See Coalition for Econ. Equity*, 946 F. Supp. at 1509 (concluding, also, that the measure is "hopelessly overbroad" to the extent that the government's goal is to avoid liability with regard to affirmative action programs that have not been tested in court).

majority actions are particularly threatening to democratic values.

Some might critique this test as overly harsh. The application of this test would strike down most of the controversial measures that have been examined. Some might argue that this is another results-oriented test, striking down those initiatives with which I might not agree. The response is that the main reason these recent initiatives fail is that they *are* extreme. Most of these initiatives restructure state constitutions and place into these charter documents the majority's "win" on highly controversial social, cultural, and political issues. These are issues over which majorities and minorities not only differ, but, in reviewing a thirty year span of data, one can also recognize that over time majorities' positions have shifted in favor of the affected minority. Arguably, majorities' more accepting attitudes were influenced by minorities' civic activism. To lock in a majority win stifles the civic activism that leads to better co-existence. Moreover, measures that exclude and "fence out" minorities from civic life in meaningful ways create and encourage separation that reinforces stigmatic attitudes. Thus, these negative results are not so much a reflection of the test, but of the radical nature of the measures that are currently gaining access to the ballot box and gaining approval.

It is possible for majorities and minorities to co-exist. We can overcome the complicated and complex dynamics that social scientists tell us govern social relations between unlikes. However, modern politics and political competition encourage excesses. That is why courts must provide needed restraint, remind us of our ideals and values, and require that, as public citizens, we enact only those laws that reflect a true measure of ourselves.

Appendix A: Summary of Results: Majority-Minority Referendums and Initiatives, 1960–1998

Appendix	Years	Topic	Total Initiatives and Referendums Surveyed	Anti-Minority Result	Electoral Anti-Minority Success Rate
B	1963–1968	Fair Housing	9	8	89%
C	1960–1979	Busing to Address School Segregation	7	6	86%
D	1977–1998	Gay Men and Lesbian Civil Rights	48	40	83%
E	1980–1998	English Language/Bilingualism	9	9	100%
F	1986–1989	AIDS	5	2	40%
G	1994	Benefits for Illegal Immigrants	1	1	100%
H	1996–1998	Affirmative Action	3	2	67%
	Total		82	68	83%

Appendix B: Fair Housing and Public Accommodations

Year	Location	Initiative	Result
1963	Berkeley, CA	Proposed Open Housing Ordinance. ¹	Failed
1964	Detroit, MI	Amendment "i" to city charter provided for homeowners' "Bill of Rights" guaranteeing right of Association and "right . . . from interference . . . to give special privileges." ²	Passed (137,671 to 114,743 votes)
1964	California	Proposition 14—repeal of fair housing legislation, whereby no state entity could deny the ability of persons to decline to lease, rent, or sell property. ³	Passed (65.3%–33.7%). Subsequently overturned
1964	Akron, OH	Repeal by referendum of city fair housing ordinance. ⁴	Passed. Subsequently overturned
	Toledo, OH	Proposed Fair Housing Ordinance. ⁵	Failed (27%–65%)
	Springfield, OH	Repeal of Fair Housing Ordinance. ⁶	Passed
	Jackson, MI	Repeal of Fair Housing Ordinance. ⁷	Passed (5,826 to 2,886 votes)
1968	Maryland	State legislature's enactment of fair housing laws is subjected to repeal by referendum. ⁸	Passed
	Washington	State legislature's enacted fair housing legislation is subjected to repeal by referendum.	Failed

¹ See Howard D. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 125–26 (1970).

² See Jack L. Walker, *Fair Housing in Michigan*, in THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASE STUDIES 353, 373 (Lynn W. Eley & Thomas W. Casstevens eds., 1968).

³ See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that Proposition 14 violated the Equal Protection Clause).

⁴ See *Hunter v. Erickson*, 393 U.S. 385 (1968) (holding that ordinance violated the Equal Protection Clause).

⁵ See Hamilton, *supra* note 1, at 1970.

⁶ See Lynn W. Eley, *Introduction* to THE POLITICS OF FAIR-HOUSING LEGISLATION, *supra* note 2, at 1, 8.

⁷ See Walker, *supra* note 2, at 378.

⁸ See *Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968) (refusing to enjoin referendum).

Appendix C: Anti-Busing

Year	Location	Initiative	Result
1960	Arkansas	Proposition authorizing officials to close schools threatened with desegregation. ¹	Failed
	Mississippi	Proposition authorizing officials to close schools threatened with desegregation. ²	Passed
1972	California	Proposition 21—"No public school student shall . . . be assigned . . . to a particular school" based on race. ³	Passed (63%–37%). Subsequently overturned
1974	Colorado	Constitutional initiative prohibiting busing of students based on race to achieve racial balance in public schools. ⁴	Passed (69%–31%)
1978	Massachusetts	Anti-busing—to prohibit race as criterion for school assignment. ⁵	Passed
	Washington	Initiative 350—"No school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest." ⁶	Approved. Subsequently overturned
1979	California	Proposition "T"—state constitutional amendment limited state court ordered busing for desegregation purposes to those situations in which a federal court would employ such a remedy to correct a Fourteenth Amendment violation. ⁷	Passed by 66% vote. Ruled constitutional

¹ See *Many Local Proposals are Decided by Voters*, WASH. POST, Nov. 11, 1960, at A1.

² See *id.*

³ *Santa Barbara Sch. Dist. v. Superior Court*, 530 P.2d 605, 611 (1975) (quoting Proposition 21).

⁴ See Austin Ranney, *The United States of America*, in *REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 67, 80 (David Butler & Austin Ranney eds., 1978).

⁵ See Helen Dewar, *Ballot-Box Issues: Gay Rights to Dueling*, WASH. POST, Nov. 9, 1978, at A1.

⁶ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1981) (holding that the initiative violated the Equal Protection Clause).

⁷ See *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982).

Appendix D: Gay Men and Lesbian Civil Rights

Year	Location	Initiative/Referendum	Result
1977	Dade County, FL	Repealed Dade County Ordinance No. 77-4, which prohibited discrimination based upon "affectional or sexual preference." ¹	Passed (2 to 1 margin, 202,314-89,562 votes)
1978	California	Proposition 6—school employees can be brought on charges if they "advocate, impose or encourage" homosexual sex acts. ²	Failed (135-37)
	Dade County, FL	Attempted repeal of Dade County Ordinance No. 77-4, which prohibited discrimination because of sexual orientation. ³	Failed (58%-42%)
	Wichita, KS	Repealed City Ordinance No. 35-242, which prohibited discrimination against homosexuals. ⁴	Failed
	St. Paul, MN	City ordinance prohibiting discrimination because of sexual orientation was repealed. The second portion of the repeal dealt with a change in the law allowing religious private schools to use church membership as a prerequisite to admission to their schools. ⁵	Passed (54,096 to 31,694 votes)
	Eugene, OR	Referendum to repeal law prohibiting discrimination against gays. ⁶	Passed

¹ See D. Jason Berggren, *Responding to the Spirit of Stonewall: Righteous Referendums, Ecumenism and the Anti-Gay Rights Politics of the Christian Right* (1995) (unpublished M.A. thesis, Florida State University) (on file with Florida State University Library).

² See JOHN M. ALLSWANG, *CALIFORNIA INITIATIVES AND REFERENDUMS, 1912-1990*, at 1-20 (1991).

³ See Berggren, *supra* note 1.

⁴ See *Wichita Repeals Homosexual Law*, N.Y. TIMES, May 10, 1978, at A1.

⁵ See Nathaniel Sheppard, Jr., *Law on Homosexuals Repealed in St. Paul*, N.Y. TIMES, Apr. 26, 1978, at A1.

⁶ See Grace Lichtenstein, *Laws Aiding Homosexuals Facing Opposition Around Nation*, N.Y. TIMES, Apr. 27, 1978, at A1; Wallace Turner, *Voters in Eugene, Ore., Repeal Ordinance on Homosexual Rights*, N.Y. TIMES, May 24, 1978, at A1.

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	Seattle, WA	Repeal of city ordinance banning discrimination against gay men and lesbians. ⁷	Passed
1980	Davis, CA	Initiative requiring the city council to adopt gay rights ordinance after hearing to determine specific provisions. ⁸	Failed (nearly 2 to 1 margin)
	San Jose, CA	City ordinance seeking to prohibit discrimination against gay men and lesbians in employment and housing.	Failed (109,238–35,957 votes)
1988	Oregon	Measure 8—requiring state/local governments and school board districts to discourage homosexuality by providing that state officials “cannot forbid the taking of any personnel action against any state employee based on the sexual orientation of such employee.” ⁹	Passed (57%–43%) Struck down: <i>Merrick v. Board of Higher Educ.</i> , 841 P.2d 646 (Or. Ct. App. 1992).
1989	Irvine, CA	Initiative denying gay men and lesbians protection under city’s anti-discrimination law—removes language protecting gay men and lesbians in the local human rights law. ¹⁰	Passed (53%–47%)
	San Francisco, CA	Initiative to extend employee benefits to “domestic partners” of city employees. In addition, non-city employees would be allowed to register their relationship. ¹¹	Failed (50.5%–49.5%)
	Santa Clara, CA	County ordinance seeking to prohibit discrimination against gay men and lesbians in employment and housing. ¹²	Failed (244,095–103,479 votes)

⁷ See RANDY SHILTS, *THE MAYOR OF CASTRO STREET* 154–58 (1982).

⁸ See Philip Hagar, *San Jose Area Voters Reject 2 Gay Rights Ordinances*, L.A. TIMES, June 5, 1980, at 1.

⁹ See Sura Rubenstein, *Court Kills Anti-Gay Rights Measure*, PORTLAND OREGONIAN, Nov. 13, 1992, at A1, available in 1992 WL 7364909.

¹⁰ See Maralee Schwartz, *Pocketbook Big Factor With Voters*, WASH. POST, Nov. 9, 1989, at A44; Victor F. Zonana, *Gay Agenda Takes Beating-Even in San Francisco*, L.A. TIMES, Nov. 9, 1989, available in 1989 WL 2224620.

¹¹ See Schwartz, *supra* note 10; Zonana, *supra* note 10.

¹² See Hagar, *supra* note 8.

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	Tacoma, WA	Proposition 2—to repeal ordinance enacted only 6 months prior, which prohibits discrimination of gay men and lesbians in employment, financial transactions, housing, and public accommodations. ¹³	Passed (51%–49%)
1990	San Francisco, CA	Proposition K—a revised version of 1989's "Domestic Partners Law," which allows gay couples to register their relationship with City Hall. However, the provisions in the 1989 version affording unmarried couples the same sick leave and funeral benefits as married couples were not included in this version. ¹⁴	Passed (54%–46%)
	Seattle, WA	Initiative 35—repeal of "Domestic Partners" and "Family Leave" ordinances, which allow city employees to use their sick leave to care for a spouse, child, or live-in partner. ¹⁵	Failed (55%–45%)
	Tacoma, WA	The issue in the city's 1989 Proposition 2 was revisited—ordinance seeking to ban discrimination against gay men and lesbians. The language in this proposition was very similar to the repealed ordinance. ¹⁶	Failed (more than 2 to 1 ratio against it)
1991	San Francisco	Proposition K—repeal of "Domestic Partner Law" enacted in 1990, which allows unmarried couples, including gay couples, to register their relationship with City Hall. ¹⁷	Failed
	St. Paul, MN	Repeal of ordinance protecting gay rights. ¹⁸	Failed

¹³ See *Tacoma Repeals Gay-Rights Measure*, SEATTLE TIMES, Nov. 8, 1989, at B5, available in 1989 WL 2954320.

¹⁴ See Kevin Roderick & Victor Zonana, *3 Bay Area Gays Win Elections; Domestic Partners Law Approved*, L.A. TIMES, Nov. 8, 1990, available in 1990 WL 2311500.

¹⁵ See Robert T. Nelson, *Domestic Partner Laws Survive Challenge*, SEATTLE TIMES, Nov. 7, 1990, at B7, available in 1990 WL 3177848.

¹⁶ See *id.*

¹⁷ See L.A. Chung, *S.F. Apartment Vacancy Control Proposition Defeated*, S.F. CHRONICLE, Nov. 6, 1991, at A5, available in 1991 WL 4218108.

¹⁸ See *National Results at a Glance*, WASH. POST, Nov. 7, 1991, at A31.

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1992	Colorado	Initiative 2—prohibits all legislative, executive or judicial action at any level of state or local government that is intended to protect gay men and lesbians from discrimination. ¹⁹	Passed (53%–47%) Struck down: <i>Evans v. Romer</i> , 517 U.S. 620 (1996).
7	Oregon	Measure 9—initiative to amend the state constitution to reflect that homosexuality is “abnormal, wrong, and perverse” and would prohibit enactment of any law protecting gay men and lesbians from discrimination by any state or local government. ²⁰	Failed (43%–57%)
	Corvalis, OR	Initiative prohibiting the city government from “recognizing or promoting homosexuality.” ²¹	Passed (nearly 2 to 1 margin)
	Springfield, OR	Initiative to amend city charter prohibiting the recognition/promotion of homosexuality. ²²	Passed (5,693–4,540 unofficial vote)
	Cincinnati, OH	To amend city charter to prohibit the municipality from granting “special privileges” to gay men and lesbians and to repeal recently enacted anti-discrimination protection. ²³	Passed (61%–39%)
		Anti-gay rights measures were attempted in numerous localities in Oregon in 1993. These measures were mainly backed by the Oregon Citizens Alliance. The remaining entries are Oregon cities and counties that attempted such measures.	

¹⁹ See *Evans v. Romer*, 517 U.S. 620 (1996).

²⁰ See Bettina Boxall, *Oregon Measure Condemning Homosexuals is Trailing*, L.A. TIMES, Nov. 4, 1992, at A20, available in 1992 WL 2843638; Robert Reinhold, *Move to Limit Terms Gathers Steam After Winning in 14 States*, N.Y. TIMES, Nov. 5, 1992, at B1, available in 1992 WL 2077314.

²¹ See Kathleen Monje, *Springfield Vote Win Heartens OCA Head*, PORTLAND OREGONIAN, May 21, 1992, at G8, available in 1992 WL 6832744.

²² See *id.*

²³ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

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	Cornelius, OR ²⁴		Passed (56%– 44%)
	Creswell, OR ²⁵		Passed
	Douglas County, OR ²⁶		Passed
	Estacada, OR ²⁷		Passed (74%– 26%)
	Jackson County, OR ²⁸		Passed
	Josephine County, OR ²⁹		Passed
	Junction City, OR ³⁰		Passed (631– 630 vote) Vote was thrown out by court, ruling that two votes were illegally cast by non- residents of the city.
	Keizer, OR ³¹		Passed (4,586– 3,748 vote)

²⁴ See Charles E. Beggs, *Oregon Group Begins Court Fight of Ban on Anti-Gay-Rights Laws*, SEATTLE TIMES, Aug. 10, 1993, at B3, available in 1993 WL 6012032; *How They Voted*, PORTLAND OREGONIAN, July 25, 1993, at C1.

²⁵ See Sura Rubenstein, *Anti-Gay Rights Measures Win Handily*, PORTLAND OREGONIAN, Sept. 22, 1993, at C1, available in 1993 WL 11689870.

²⁶ See *How They Voted*, *supra* note 24.

²⁷ See Rubenstein, *supra* note 25.

²⁸ See *id.*

²⁹ See Beggs, *supra* note 24; *How They Voted*, *supra* note 24.

³⁰ See *Anti-Gay Rights Vote Illegal*, SEATTLE TIMES, Sept. 23, 1993, at B2, available in 1993 WL 6018552; Kathleen Monje, *Anti-Gay Rights Initiative Won by 1 Vote*, PORTLAND OREGONIAN, July 23, 1993, at C2, available in 1993 WL 6925824; Sura Rubenstein, *OCA Prevails in Marion County, Three Cities*, PORTLAND OREGONIAN, Mar. 23, 1994, at A1, available in 1994 WL 44520125.

³¹ See *Oregon Cities Adopt Anti-Gay Rights Measures*, DAILY LAB. REP., Nov. 12, 1993, at 1.

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	Klamath, OR ³²		Passed (66%– 34%)
	Lebanon, OR ³³		Passed
	Linn County, OR ³⁴		Passed (69%– 31%)
	Medford, OR ³⁵		Passed
	Mollala, OR ³⁶		Passed (55%– 45%)
	Oregon City, OR ³⁷		Passed (2,308– 2,135 unofficial vote)
	Sweet Home, OR ³⁸		Passed (77%– 23%)
1994	Idaho	Initiative proscribing discrimination protection based on sexual orientation and limiting school materials. ³⁹	Failed
	Oregon	Measure 13—amend state constitution to exclude sexual orientation from protected class status and limiting school and library materials. ⁴⁰	Failed
	Austin, TX	Repealed extension of insurance benefits to domestic partners.	Passed (62%– 38%)

³² See *How They Voted*, *supra* note 24.

³³ William McCall, *Ore. Anti-Gay Measures Pass*, SEATTLE TIMES, Sept. 22, 1993, at B8, available in 1993 WL 6018437.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *Oregon Cities Adopt Anti-Gay Rights Measures*, *supra* note 31.

³⁸ See McCall, *supra* note 33; Rubenstein, *supra* note 25.

³⁹ See *Mourning in America*, THE NEW REPUBLIC, Nov. 28, 1994; Susan Drumheller, *Alliance not Ready to Give Up Anti-Gay Fight*, THE SPOKESMAN-REV., Nov. 13, 1994, at B1, available in 1994 WL 4513257.

⁴⁰ See Sura Rubenstein & Tom Bates, *Campaign 94 Voter's Guide*, PORTLAND OREGONIAN, Nov. 6, 1994, at P8, available in 1994 WL 4856645.

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	Alachua Co., FL	Repealed county anti-discrimination ordinance covering sexual orientation. ⁴¹	Passed
1995	Maine	Referendum limiting antidiscrimination protections to classes that exclude sexual orientation. ⁴²	Failed (53%–47%)
1997	Washington	Initiative 677—bans discrimination based on sexual orientation in the workplace. ⁴³	Failed (60%–40%)
1998	Alaska	Measure 2—constitutional amendment limiting marriage to persons of the opposite sex. ⁴⁴	Passed (68%–32%)
	Maine	Repeal of law that would ban discrimination based on sexual orientation enacted by state legislature. ⁴⁵	Passed (51%–49%)
	Hawaii	Constitutional amendment allowing state legislature to restrict marriage to persons of the opposite sex. ⁴⁶	Passed (69%–29%)

⁴¹ See Jon Glass & Phil Long, *Gainesville Takes Gay Rights Law Off the Books*, MIAMI HERALD, Nov. 9, 1994, at 21A.

⁴² See 1995—*Glancing Back at the Year's Major Stories*, PORTLAND PRESS HERALD, Dec. 31, 1995, at 5A, available in 1995 WL 14383715.

⁴³ See State of Washington, Office of the Secretary of State, Initiative to the People (1997) <<http://www.secstate.wa.gov/inits/people97.htm>>; Kathy Mulady, *City Weighs Necessity of Gay Rights Ordinance Sexual Orientation Not Included in Anti-Discrimination Law*, THE SPOKESMAN-REV., Aug. 2, 1998, at A1, available in 1998 WL 13423805.

⁴⁴ See Alaska Division of Elections, Election Summary Report, State of Alaska 1998 General Election (last updated Dec. 1, 1998) <<http://www.gov.state.ak.us/lsgov/elect98/results.htm>>.

⁴⁵ See Maine Elections Division, Department of the Secretary of State, Referendum Election Results—February 10, 1998 (visited Apr. 20, 1999) <<http://www.state.me.us/sos/cec/elec/Ref98feb.htm>>; see also Frank Fisher, *Gay-rights Activists Outspent Their . . .*, THE ASSOCIATED PRESS POL. SERV., Feb. 16, 1998, available in 1998 WL 7386946; *Portland Joins Line to Gay Rights Ordinance*, PORTLAND NEWS HERALD, Apr. 3, 1998, at 1.

⁴⁶ See Hawaii Office of Elections, 1998 General Election Results, Statewide Summary Report (visited Apr. 20, 1999) <<http://www.hawaii.gov/elections/reslt98/general/98swgen5.htm>>; see also Bruce Dunford, *Those Who Don't Want a Constitutional Amendment on . . .*, THE ASSOCIATED PRESS POL. SERV., July 30, 1998, available in 1998 WL 7433494.

Appendix E: English-Only and Bilingual Education

Year	Location	Initiative	Result
1980	Dade County, FL	Ordinance proscribing use of English language in any city activity. ¹	Passed (2 to 1 margin)
1983	San Francisco, CA	Proposition "O" ²	Passed
1984	California	Proposition 38—Governor must request U.S. President and U.S. Attorney General that voting materials be in English only. ³	Passed
1986	California	Proposition 63—declaring English "Official Language" and empowering legislature to enforce. ⁴	Passed
1988	Arizona	Constitutional amendment declaring English official language and proscribing use of languages other than English by state employees and officials. ⁵	Passed (51%–49%)
	Colorado	Constitutional amendment declaring English official language and empowering legislature to enforce. ⁶	Passed (829,617–527,053 votes)
	Florida	Constitutional amendment declaring English official language and empowering legislature to enforce. ⁷	Passed

¹ Metropolitan Dade County, Fla., Ordinance No. 80-128 (1980).

² Kathryn A. Woolard, *Sentences in the Language Prison: The Rhetorical Structuring of an American Language Policy Debate*, 16 AM. ETHNOLOGIST 268 (1989).

³ See JOHN M. ALLSWANG, CALIFORNIA INITIATIVES AND REFERENDUMS, 1912–1990, at 1–20 (1991).

⁴ See *id.*

⁵ See FLA. CONST. art. 2, § 9 (1988); see also *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (1995) (en banc), *vacated on remand*, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997); *Ruiz v. Hall*, 957 P.2d 989 (Ariz. 1989). The Arizona Court, while rejecting the initiative, steered clear of an intent analysis, instead stating its confidence in the good faith of the voters of Arizona. See *id.*

⁶ See Digest of Initiatives and Referenda of Colorado (last updated Dec. 4, 1998) <http://www.co.us/gov_dir/leg_dir/lcsstaff/research/CONSTNL.htm>.

⁷ See Memorandum of the Florida Secretary of State to the Florida Constitutional Revision Commission (1998) (on file with the author).

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1998	Alaska	Government required to use English. ⁸	Passed (69%–31%)
	California	Proposition 227—requires all public school instruction to be conducted in English. ⁹	Passed (61%–39%)

⁸ See Alaska Division of Elections, Election Summary Report (last updated Dec. 1, 1998) <<http://www.gov.state.ak.us/lrgov/elect98/results.htm>>.

⁹ See California Secretary of State, Primary98—State Ballot Measures (visited Apr. 20, 1999) <<http://Primary98.ss.ca.gov>Returns/prop/>>.

Appendix F: AIDS

Year	Location	Initiative	Result
1986	California	To prohibit AIDS victims from working as teachers or in food-related jobs. Further, it would subject them to possible quarantine. ¹	Failed (29%–71%)
1988	California	3 Measures ² <i>Measure 69</i> —would subject AIDS victims to quarantine. <i>Measure 96</i> —testing for certain sex offenders or persons who have assaulted peace officers or medical personnel. <i>Measure 102</i> —required health providers to report the names of persons who tested positive for AIDS.	<i>69</i> : Failed (29%–71%) <i>96</i> : Passed (68%–32%) <i>102</i> : Failed (34%–66%)
1989	Concord, CA	Repealed ordinance adopted by city council barring discrimination against AIDS victims (by referendum).	Passed (56%–44%)

¹ See Cass Peterson, *The Initiatives; 2 States Vote to Curb Taxes; Measures to Set Up Lotteries Head for Approval*, WASH. POST, Nov 5, 1986, at A33.

² See JOHN M. ALLSWANG, CALIFORNIA INITIATIVES AND REFERENDUMS, 1912–1990, at 157, 161, 166 (1991).

Appendix G: Benefits for Illegal Immigrants

Year	Location	Initiative	Result
1994	California	Proposition 187—bans medical & school benefits to illegal immigrants and children. ¹	Passed (59%–41%)

¹ See *League of United Latin Am. Citizens v. Wilson*, Nos. 94-7569 MRP, 94-7652 MRP, 94-7570 MRP, 95-0187 MRP, 94-7571 MRP, 1998 WL 141325 (C.D. Cal. Mar. 13, 1998) (holding that federal law largely preempted Proposition 187), *appeal docketed*, No. 98-55671 (9th Cir. Apr. 21, 1998).

Appendix H: Affirmative Action

Year	Location	Initiative	Result
1996	California	Proposition 209—bans preferences or discrimination on account of race, gender, and national origin. ¹	Passed (54%–46%)
1997	Houston, TX	Proposition A—city ordinance banning affirmative action “preferences” in municipal programs. ²	Failed (55%–45%)
1998	Washington	Initiative 200—same as “CCRI.” ³	Passed (58%–42%)

¹ See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd* 122 F. 3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

² See Harris County Clerk's Office, Final Official Cumulative Results for the November 4, 1997 Election (visited Apr. 20, 1999) <<http://www.co.harris.tx.us/cclerk/elect/HISTORY/110497/FrameSet1.html>>; see also Sam Howe Verhovek, *Houston to Vote on Repeal of Affirmative Action*, N.Y. TIMES, May 4, 1998, at A16.

³ See Washington Secretary of State, Results in the 1998 Washington State General Election, Summary Report (visited Apr. 20, 1999) <<http://www.secstate.wa.gov/elections/gen98.htm>>; Sam Howe Verhovek, *From Same Sex Marriages to Gambling, Voters Speak*, N.Y. TIMES, Nov. 5, 1998, at B1, B10.

